(15,517.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1133.

THE UNITED STATES, APPELLANT,

vs.

EISNER & MENDELSOHN COMPANY, APPELLEE.

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Filed with the Petition in the Above-entitled Case.

INDEX.

	Original.	Print.
Petition of importer	1	1
Bond for damages and costs	5	3
Summons for return	7	4
Return	8	5
Exhibit "A"—Letter, special deputy collector to board of United States general appraisers, submitting protest	9	5
"B"—Protest	10	6
"C"—Letter, examiner in charge to United States appraiser, describing merchandise	11	7
"D"—Letter, special deputy collector to board United States general appraisers, submitting protest	12	7
"E"—Protest	13	8
"F"—Decision of board of United States general appraisers	14	9
"G"—Decision of board of United States general appraisers (G. A. 358)	15	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1894.

	Original.	Print.
Application of importer for order of reference	18	11
Order of reference to George H. Sharpe	19	11
Order extending time for further evidence	20	12
Return of further evidence	22	13
Testimony of Max J. Breitenbach (direct)	23	13
(cross)	24	13
Andrew J. Ditman (direct)	29	17
(cross)	31	18
(redirect)	35	21
(recross)	36	22
Alfred H. Kennedy (direct)	36	22
(cross)	37	23
(redirect)	37	23
(recross)	38	23
Daniel R. Chichester (direct)	40	25
Moritz Eisner (direct)	41	26
(cross)	46	29
(redirect)	50	33
(recross	51	33
(re-redirect)	51	33
Francis Wyaw (direct)	51	33
(cross)	53	34
Stipulation	55	34
Exhibit "E"—Label	57	36
"F"—Circular	58	36
"G"—Circular	62	36
"H"—Letter, Leffman to Eisner & Mendelsohn	86	36
"I"—Translation	87	37
"K"—Letter, Leffman to Eisner & Mendelsohn	88	37
Opinion of court—Coxe, *J.*	90	38
Decree of reversal	95	41
Assignment of errors	97	42
Notice of appeal	99	43
Petition of appeal and allowance	100	43
Citation	101	44
Clerk's certificate	102	44
Opinion	103	45
Petition of appellee for rehearing	108	47
Affidavit of Moritz Eisner	111	48
Notice of application for hearing	113	49
Order of circuit court, southern district of New York	114	50
Denial of motion for rehearing	116	50
Certificate of clerk of United States circuit court, southern district of New York	117	51

1 United States Circuit Court for the Southern District of New York.

In the Matter of The Application of EISNER & MENDELSOHN COMPANY for a Review of the Decisions of the United States Board of General Appraisers on Protests No. 16925*a* and 17986*a*, as to the Law, Facts, Classification and Rate of Duties Imposed on Certain Consignments of "Johann Hoff's Malt Extract" Imported by Them per S. S. "Thingvalla," Sept. 5, 1891, and S. S. "Island," Oct. 6, 1891. } 935.

To the honorable circuit court of the United States for the southern district of New York:

Your petitioners, Eisner & Mendelsohn Company, respectfully represent that:

2 They imported by the S. S. "Thingvalla," September 5th, 1891—import entry 1951—2,131 gallons of "Johann Hoff's malt extract," in 13-oz. bottles, and per S. S. "Island," October 6th, 1891—import entry 2040—5,000 gallons of "Johann Hoff's malt extract," in 13-oz. bottles.

That the collector of customs of the port of New York, classified, rated and charged the said importations with a duty at the rate of forty (40) cents per gallon, amounting, on the importation of the "Thingvalla," to $852.40, and on that of the "Island," to $2,000.00, being a total of $2,852.40. That said collector classified, rated and charged said duties under paragraph 338 of "An act to reduce revenues and equalize duties on imports, and for other purposes," act of Congress of October 1st, 1890.

Whereas, said importation so imported should have been classified, rated and charged under paragraph 75 of said act, as a medicinal preparation; being a medicinal proprietary preparation of which alcohol is not a component part, and said preparation so imported not being specifically provided for in the act; and the actual dutiable value of such preparation so imported being 49¾ cents per gallon. The total amount subject to duty on the "Thingvalla" was $1,060.00, and the duty properly chargeable, under said paragraph 75, at 25 per centum ad valorem, being $265.00, and the amount subject to duty on the "Island," $2,488.00, and the duty properly chargeable, as above, being $622.00.

The amount of duty exacted from your petitioners was—on the consignment of the "Thingvalla," $852.40, and on that of the "Island," $2,000.00, being a total of $2,852.40, showing an excess of duties collected from your petitioners of $1,965.40 on both consignments.

And your petitioners, within ten days after such ascertainment and liquidation of duties on the said preparation so imported, respectively gave notice in writing to the collector, setting forth

therein distinctly and specifically, and in respect to each
3 entry and payment, the reasons for his objections thereto, as hereinbefore stated, paying the full amount of duties and charges so ascertained by the said collector to be due thereon.

And thereupon the collector, as required by law, transmitted the invoice and all the papers and exhibits connected therewith, to a board of three general appraisers on duty at the port of New York; which said board, on the 26th day of May, 1892, after hearing the evidence and considering the protests, affirmed the classification, rating and duties chargeable upon the said "Johann Hoff's malt extract;" finding the same to be a preparation known to commerce as a "malt extract," as specifically defined in section 338 of the act aforesaid, subject to a duty of 40 cents a gallon.

Wherefore, your petitioners, Eisner & Mendelsohn Company, being dissatisfied with such decision of the board of general appraisers, as to the construction of the law and facts respecting the classification of such "Johann Hoff's malt extract," and the rate of duty imposed thereon under such classification, hereby apply to this court for a review of the questions of law and fact involved in such decisions.

And your petitioners say, that the board of general appraisers erred in matter of law:

First. In overruling your petitioners' protest against the decision of the collector.

Second. In affirming the decision of the collector in classifying the said "Johann Hoff's malt extract" as dutiable under section 338, as a "malt extract" known to commerce, and in assessing duty thereunder at 40 cents per gallon.

Third. In not holding said "malt extract" to be a medicinal preparation; being a medicinal proprietary preparation of which alcohol is not a component part, and not specifically provided for in the act, and included within paragraph 75 as dutiable at 25 per centum ad valorem.

4 Fourth. In not sustaining your petitioners' protest, and in not reversing the decision of the collector in classifying the said "malt extract" as dutiable under section 338, and assessing it thereunder.

And your petitioners further say, that the board of appraisers erred in matters of fact:

First. In finding from the evidence that the said "Johann Hoff's malt extract" was a "malt extract" as known to commerce, and included in section 338, and subject to the duty therein stated.

Second. In not finding, from the evidence, that the said "Johann Hoff's malt extract" was, in fact, a medicinal preparation, being, in fact, a medicinal proprietary preparation, of which alcohol is not a component part, and the duty on which is not otherwise specifically provided for in the act, being dutiable under paragraph 75 of such act.

Wherefore, your petitioners pray for a review of the questions of law and fact involved in the said decisions of the United States board of appraisers, and that the said "Johann Hoff's malt extract"

be adjudged to be legally classified, rated and dutiable under paragraph 75, as a "medicinal preparation" at twenty-five (25) per centum ad valorem, and that the excess of duty collected from your petitioners, to wit, the sum of two thousand five hundred ($2,500) dollars, be ordered to be returned and refunded to your petitioners, and an accounting may be ordered by the proper officer of the Treasury of the United States.

EISNER & MENDELSOHN COMPANY,
By DUDLEY, MICHENOR & RAY, *Attorneys.*

(Endorsed:) 935. United States circuit court, southern district of New York. Petition for review of decisions of board of
5 appraisers on protests 16925*a*, 17986*a*, of Eisner & Mendelsohn Company. Petition. Dudley, Michenor & Ray, att'ys for petitioners. Served June 10, 1892, custom-house, New York. U. S. circuit court, filed June 10, 1892. John A. Shields, clerk.

Know all men by these presents, that I, Joseph Mendelson, am held and firmly bound unto the United States of America in the sum of fifty (50) dollars, to be paid said United States of America, for the payment of which, well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents. Signed with my seal, and dated this seventh (7) day of June, 1892.

Whereas, Eisner & Mendelsohn Company has applied to the circuit court of the United States, for the southern district of New York, for a review of the questions of law and fact involved in certain decisions of the board of United States appraisers, made upon the entry of certain merchandise, imported by them as per S. S. "Thingvalla," September 5th, 1891, protest No. 16925*a*, being twenty-one hundred and thirty-one gallons "Johann Hoff's malt extract," and "Island," Oct. 6th, 1891, protest No. 178,986*a*, five thousand gallons.

Now, therefore, the condition of this obligation is such, that if the above-named Eisner & Mendelsohn Company shall prosecute said proceedings with effect, and pay all damages and costs which shall be adjudged against them therein, if they shall fail to make such proceedings good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

JOSEPH MENDELSON. [SEAL.]

Sealed and delivered and taken and acknowledged this seventh day of June, 1892, before me—

[SEAL.] JAMES A. CARTER,

Notary Public, N. Y. Co.

6 —— —— being duly sworn, deposes and says, that he resides in the southern district of New York, and that he is worth one hundred (100) dollars, over and above all just debts and liabilities.

JOSEPH MENDELSON.

Sworn to this seventh day of June, 1892, before me—
[SEAL.] JAMES A. CARTER,
Notary Public, N. Y. Co.

This bond is approved as to form and amount and sufficiency of security.

E. HENRY LACOMBE.

Dated New York city, N. Y., 10th day of June, 1892.

(Endorsed:) 935. United States circuit court, for the southern district of New York. In the matter of the application for a review of the decision of the board of appraisers, as to rate, &c., of duties on certain "Johann Hoff's malt extract," imported by them per S. S. "Thingvalla," Sept. 5, 1891. Protest 17986*a*, protest 16925*a*. Bond for costs on application for review. Dudley, Michenor & Ray, atty's for petitioners. U. S. circuit court. Filed June 10, 1892. John A. Shields, clerk.

7 At a stated term of the United States circuit court, for the southern district of New York, held at the United States court and post-office building, in the city of New York, on the 10th day of June, 1892.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter
of
The Application of EISNER & MENDELSOHN Co. for a Review of the Decisions of the General Appraisers, May 26, '92, as to the Law, Facts, Classification, and Rate of Duties Imposed on "Johann Hoff's Malt Extract," Imported by them per S. S. "Thingvalla," Sept. 5, 1891, and S. S. "Island," Oct 6, 1891.

Upon reading and filing the annexed petition of Eisner & Mendelsohn Co., importers of the merchandise therein described, and on motion of Dudley, Michenor & Ray, attorneys for said petitioners, it is—

Ordered, that the board of appraisers at the port of New York, return to this court the record and evidence taken by them in the above-entitled matters, together with a certified statement of the facts involved in the case and their decision thereon.

E. HENRY LACOMBE.

8 (Endorsed:) 935. United States circuit court, southern district of New York. In the matter of review of decisions of board of appraisers, on protests 16925*a*, 17986*a*, of Eisner & Mendelsohn Co. Order of court. Dudley, Michenor & Ray, att'ys for petitioners. U. S. circuit court. Filed Jun- 10, 1892. John A. Shields, clerk.

In the Circuit Court of the United States for the Southern District of New York.

In the Matter of The Appeal of EISNER & MENDELSOHN Co. from the Decision of the Board of U. S. Gen'l Appraisers in the Matter of Certain Mddse. Imported by them per "Thingvalla," Sept. 5, 1891; "Island," Oct. 6, 1891.	Suit No. 935. Return of the Board of United States General Appraisers to the Order of Hon. E. Henry Lacombe. Dated New York, July 6, 1892.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that on the 23rd day of November, 1891, a letter dated November 27th, 1891, which is hereto annexed and marked Exhibit A, was received from the collector of customs at New York, submitting under the provisions of sec. 14, of the act of June 10, 1890, the protest described and marked as follows: Exhibit B.

Ex. B. Collector's No.	Board No.	Protester.	Vessel.	Date of entry.
47445.	16925 A.	Eisner & Mendelsohn Co.	S. S. "Thingvalla."	Sept. 5, '91.

9 16925 A.

H. E. E. EXHIBIT A. J. J.

CUSTOM-HOUSE, PORT OF NEW YORK,
COLLECTOR'S OFFICE, *Nov.* 21*st*, 1891.

Hon. board of U. S. gen'l appraisers at the port of New York.

GENTLEMEN: I submit the protest of Eisner, Mendelsohn & Co., No. 47445, from the assessment of duty by this office at the rate of 40c. per gallon on certain so-called "fluid malt extract," imported by them in the "Thingvalla," Sept. 5, '91.

An inspection of the invoice shows that the merchandise was returned by the appraiser as "fluid malt extract in bottles, 40c. per gallon." Duty was assessed thereon at the rate above stated, under the provisions of par. 338, N. T.

Reference is made to the special report of the appraiser herewith.

I have to report that the claimants have complied with the requirements of section 14, of the act of June 10, 1890.

The naval officer concurs in the decision of this office.

The entry and invoice covered by the above protest are inclosed herewith.

Respectfully yours, J. J. COUCH,
Special Deputy Collector.

(4 inclosures.)

(Endorsed:) 10098 Po. 16925 A. Port of New York, collector's office, Nov. 21, 1891; F. Hendricks, collector. Submitting protest No. 47445, of Eisner, Mendelsohn & Co. 4 papers inclosed. 10098. Office U. S. general appraisers, New York, received Nov. 23, 1891.

10 16925 A.

EXHIBIT B.

Liquidating department.

R. F. Downing & Co., 20 Exchange place, New York, customs and forwarding agents.
Richard F. Downing. Thomas H. Downing.

OCTOBER 12TH, 1891.

Hon. Francis Hendricks, collector of customs, New York.

SIR: We hereby protest against your assessment of duty at the rate of 40 cents per gallon, on certain fluid malt extract and 1½c. per pound on bottles contained in cases H 1 to 2,000, specified in our duty-paid entry 137,821, *ex* S. S. "Thingvalla," September 5th, '91; liquidated October 7th, '91, increase.

We claim that the above-described article is dutiable at the rate of 25 % ad valorem, in accordance with the rulings contained in S. S. 2867, June 19th, '76; S. S. 4834, April 19th, '81, and paragraph 75, Schedule A, act of October 1st, '90.

We pay the additional duty in order to get possession of our goods, claiming a refund of the difference between the rate and amount assessed, and the rate and amount which may hereafter be adjudged to be legally due thereon, without reference to any specified claim herein made.

Yours respectfully, EISNER & MENDELSOHN CO.
R. F. DOWNING, *Att'y.*

Decided May 26, 1892.

(Endorsed:) 47445. Eisner, Mendelsohn — Co. "Thingvalla," fluid malt extract. 10098. Vessel, c "Thingvalla." Entry, 1891, Sept. 5. Liq-ed, 1891, Oct. 7. Protested, 1891, Oct. 15. Custom-house, New York, Oct. 15, 1891, received.

11 That accompanying the letter of the collector aforesaid, was a report from the United States appraiser at New York, describing the merchandise subject of said protest 16925 A, which report is hereto annexed, marked "Exhibit C."

16925 A.

EXHIBIT C.

PORT OF NEW YORK,
APPRAISER'S OFFICE, *October* 26, 1891.

M. W. Cooper, Esq., U. S. appraiser.

SIR: Messrs. Eisner & Mendelson Co. protest (No. 47445) against the assessment of duty at the rate of 40c. per gallon, on certain fluid malt extract, claiming same to be dutiable at 25 % ad val., under par. 75, N. T.

The nature and characteristics of the merchandise is admitted. It is fluid malt extract, and, therefore, dutiable at the rate assessed, under the specific provision contained in par. 338, N. T.

The papers are herewith returned.

Very respectfully, J. McC. FARINGTON,
Examiner in Charge, 10 *Div.*

(Endorsed:) Port of New York, appraiser's office, Oct. 26, 1891. J. McC. Farington, ex'r in charge. Subject: Protest 47445, Eisner & Mendelsohn Co. Fluid malt extract. "Thingvalla," Sept. 5, '91. Respectfully forwarded to the collector. Approved, M. W. Cooper, appraiser.

12 They state that on the 23rd day of December, 1891, a letter, dated December 22, 1891, which is hereto annexed and marked Exhibit D, was received from the collector of customs at New York, submitting under the provisions of sec. 14 of the act of June 10, 1890, the protest described and marked as follows: (Exhibit "E.")

Ex. E. Collector's No.	Board No.	Protester.	Vessel.	Date of entry.
52278.	17986 A.	Eisner & Mendelsohn Co.	S. S. "Island."	Oct. 6, 1891.

17986 A.

H. E. E. EXHIBIT D. J. J.

CUSTOM-HOUSE, PORT OF NEW YORK,
COLLECTOR'S OFFICE, *Dec. 22nd*, 1891.

Hon. board of U. S. gen'l appraisers at the port of New York.

GENTLEMEN: I submit the protest of Eisner & Mendelsohn Co., No. 52278, from the assessment of duty by this office, at the rate of 40c. per gallon, on certain so-called "malt extract," and 1½c. per pound on the "bottles" containing the same, imported by them in the "Island," Oct. 6, 1891.

An inspection of the invoice shows that the merchandise was returned by the appraiser as "fluid malt extract, in bottles, 31–32 gallons per dozen."

Duty was assessed thereon at the rates above stated, under the provisions of par. 338 and 103 N. T. Note G. A. 358.

I have to report that the claimants have complied with the requirements of section 14 of the act of June 10, 1890.

The naval officer concurs in the decision of this office.

The entry and invoice covered by the above protests are inclosed herewith.

Respectfully yours, J. J. COUCH,
Special Deputy Collector.

(3 inclosures.)

13 (Endorsed:) 13914 Po. 17986 A. Port of New York, collector's office, Dec. 22nd, 1891. F. Hendricks, collector. Submitting protest, No. 52278, of Eisner & Mendelsohn Co. 3 papers inclosed. 10914. Office U. S. general appraiser, New York, received Dec. 23, 1891.

EXHIBIT E.

Liquidating department.

R. F. Downing & Co., 20 Exchange place, New York, customs and forwarding agents.

Richard F. Downing. Thomas H. Downing.

NOVEMBER 9TH, 1891.

Hon. Francis Hendricks, collector of customs, port of New York.

SIR: We hereby protest against your assessment of duty at the rate of 40 cents per gallon on malt extract, and 1½ cents per pound on bottles containing same, and which is contained in cases H 1–2000, specified in our duty-paid entry, 15581 *ex* S. S. "Island," Oct. 6th, '91, and liquidated November 5th, '91, refund.

We claim that the article, as above described, is dutiable at the rate of 25 % ad valorem, in accordance with the ruling as contained in S. S. 2867, June 19th, '76, and S. S. 4834, April 19th, '81, and paragraph 75, Schedule A, in accordance with the act of October 1st, '90.

We pay the additional duty in order to get possession of our goods, claiming a refund of the difference between the rate and amount assessed and the rate and amount which may hereafter be adjudged to be legally due thereon, without reference to any specified claim herein made.

Yours respectfully, EISNER & MENDELSOHN CO.
R. F. DOWNING, *Att'y.*

Decided May 26, 1892.

14 (Endorsed:) 52278. Eisner & Mendelsohn Co. "Island," bottles. 10914. Vessel, c. "Island." Entry, 1891, Oct. 6; Liq'ed, 1891, Nov. 5; protested, 1891, Nov. 11. Custom-house, New York, Nov. 11, 1891, received.

That on the 26th day of May, 1892, the board of general appraisers rendered its decision in the matter of said protest No. 16925*a*, &c., a copy of which is hereto annexed and marked "Exhibit F."

And there is also hereto annexed a copy of the opinion and decision of the board of U. S. general appraisers, G. A. 358, marked "Exhibit G," covering mdse. identical in character, and which is made a part of the decision in this case so far as the same is applicable.

EXHIBIT F.

Before the U. S. general appraisers at New York.

MAY 26, 1892.

In the matter of the protests, $\frac{16925}{47445}$ and $\frac{17986}{52778}$ A, Eisner & Mendelsohn Co. against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain fluid malt extract imported per "Thingvalla," Sep. 5, 1891 · "Island," Oct. 6, 1891.

Opinion by Wilkinson, G. A.

The merchandise is a fluid malt extract, identical in character with that covered by our decision, G. A. 358. It was assessed for duty at 40 cents per gallon and 1½ cents per pound on the bottles, under par. 338 and par. 103, N. T., respectively, and is claimed to be dutiable at 25 %, under paragraph 75, as a medicinal preparation.

15 In accordance with the decision named, the decision of the collector is hereby affirmed.

WILBUR F. LUNT,
J. B. WILKINSON, JR.,
CHARLES H. HAM,
Board of U. S. General Appraisers.

(4 encl.)

Invoice and entries rec'd, with protests returned herewith. Protest rec'd with collector's letters of Nov. 21 and Dec. 22, 1891.

R.

EXHIBIT G.

(G. A. 358.)

Malt extract—Johann Hoff's.

Before the U. S. general appraisers at New York, February 26, 1891,

In the matter of the protest 3565*b*, of John H. Boden & Co. against the decision of the collector of customs at San Francisco, Cal., as to the rate and amount of duties chargeable on certain "Johann Hoff's malt extract" imported per "Crown of Scotland," December 19, 1890.

Opinion by Tichenor, General Appraiser.

The merchandise in dispute is a fluid, in colored molded glass bottles, holding each not more than one pint, and not less than

one-quarter of a pint, and was invoiced and entered as malt extract. Duty was assessed upon the bottles at 1½ cents per pound, under the appropriate provision in paragraph 103, act of October 1, 1890, and upon the contents at 40 cents per gallon, under
16 paragraph 338 of said act, which reads: "Malt extract, fluid, in casks, 20 cents per gallon; in bottles or jugs, 40 cents per gallon; solid or condensed, 40 per cent. ad valorem.

The importers claim in their protest, that the so-called malt extract is dutiable under the provision in paragraph 75 of the new tariff act for "medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, 25 per cent. ad valorem;" and they contend, in other papers filed in the case, that it "is not, in any sense, what is known in commerce as a malt extract," for Johann Hoff's malt extract "is a liquid preparation of various ingredients in conjunction with malt extract, and is designed to be used, and is used, for medicinal purposes," * * * "in the treatment of certain diseases, such as indigestion, malnutrition, general debility," etc., "and, as such, is recommended and prescribed by the highest medical authorities." In support of this contention they refer to two decisions of the Treasury Department, dated, respectively, June 19, 1876, and April 19, 1881, in which the identical article was held to be dutiable as a proprietary medicine.

We do not dispute the correctness of these decisions. Specific provision was not, however, made for malt extract in the then existing tariff law, nor in the act of March 3, 1883. Various preparations of malt, or of malt extract, combined with other ingredients, such as iron, quinine, pepsin, hypophosphites, oil, and coloring and flavoring substances, and which are commercially known as "malt extracts," are recognized by the medical profession as remedial agents, and are proprietary preparations.

Paragraph 75 is applicable to such medicinal proprietary preparations only as are not otherwise specially provided for in the new tariff act. Paragraph 338 provides specially for "malt extract," and applies to all substances known to commerce by that
17 name, or which possess the characteristic qualities of malt extract, regardless of the uses for which intended or to which adapted.

It is a familiar rule that a specific designation *eo nomine* must prevail over general terms, and the commercial designation of an article is the standard by which its dutiable character is fixed.

The particular article in question is known in commerce as "Johann Hoff's malt extract," and is so denominated in the labels upon the bottles in which imported and sold, and in the trade circulars and advertisements issued by the manufacturer and selling agents.

A sample bottle of the article was submitted to the appraiser at this port, for chemical determination by experts in this department. He reports that the article contains alcohol, maltose, dextrine, ash-

coloring matter, hop extract, albuminoids and water, and that the bottle contains less than one pint.

The collector's action is affirmed.

GEO. C. TICHENOR,
J. B. WILKINSON, JR.,
THAD. S. SHARRETTS, *Board.*

And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

WILBUR F. LUNT,
J. B. WILKINSON, JR.,
GEORGE H. SHARPE,
Board of U. S. General Appraisers.

18 (Endorsed:) No. 935. U. S. circuit court, southern district of New York. In the matter of certain importations by Eisner & Mendelsohn Co., per "Thingvalla," September 5, '91; "Island," Oct. 6, '91. Return of record, evidence and facts by board of U. S. general appraisers. U. S. circuit court. Filed Jul- 6, 1892. John A. Shields, clerk.

At a stated term of the United States circuit court for the southern district of New York, held at the United States court and post-office building, in the city of New York, on the ninth day of July, 1892.

Present: Hon. Addison Brown, judge.

In the Matter
of
The Application of EISNER & MENDELSOHN CO. for a Review of the Decisions of the General Appraisers, May 26, '92, as to the Law, Facts, Classification, and Rate of Duties Imposed on "Johann Hoff's Malt Extract," Imported by Them per S. S. "Thingvalla," Sept. 5, 1891, and S. S. "Island," Oct. 6, 1891.

Come now the petitioners in the above-entitled case, by their attorneys, Dudley, Michenor & Ray, and move the court that the same be referred to one of the United States general appraisers,
19 as an officer of this court, to take and return to the court such further evidence as may be offered by such petitioners, the importers of the articles mentioned in said petition, or the Secretary of the Treasury of the United States, or the collector of the port of New York.

DUDLEY, MICHENOR & RAY,
Att'ys for Petitioner.

Upon the reading and filing of the above motion of Dudley, Michenor & Ray, attorneys for said petitioners, it is—

Ordered, that this case is hereby referred to George H. Sharpe, general appraiser, as an officer of this court, to take and return to

the court such further evidence as may be offered by such petitioners, the importers of the articles mentioned in said petition, or the Secretary of the — United States, or the collector of the port of New York.

ADDISON BROWN.

(Endorsed:) No. 935. United States circuit court, for the southern district of New York. In the matter of the petition of Eisner & Mendelsohn Co., for a review of decisions of board of appraisers. Motion to take testimony and order of court. Dudley, Michenor & Ray, att'ys for petitioners. U. S. circuit court. Filed Jul- 9, 1892. John A. Shields, clerk.

20 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable E. Henry Lacombe, circuit judge.

In the Matter of The Application of EISNER & MENDELSOHN Co. as to Certain Importations per "Thingvalla," Sep. 5, 1891, and "Island," Oct. 6, 1891.	"A," No. 935.

On reading and filing the annexed consent of Dudley, Michenor & Ray, Esqs., attorneys for the above-named importers, and on motion of Edward Mitchell, Esq., U. S. attorney, and attorney for the collector of customs at the port of New York, it is—

Ordered, that the time for taking and returning such evidence as may be offered by the said collector and the above-named importers in this cause, pursuant to the orders of this court, dated July 9 and Aug. 31, 1892, be, and the same is hereby, extended sixty days from the date hereof.

E. HENRY LACOMBE.

21 We hereby consent that the above order be made.

DUDLEY, MICHENOR & RAY,
Attorneys for Importers.

(Endorsed:) "A," 935. U. S. circuit court, southern district of New York. In the matter of the application of Eisner & Mendelsohn Company, as to certain importations per "Thingvalla," Sep. 5, 1891, and another entry. Order extending time for taking and returning further evidence. Edward Mitchell, U. S. attorney, and attorney for the above-named collector, room 50, post-office building, New York city. U. S. circuit court. Filed Oct. 7, 1892. John A. Shields, clerk.

22 United States Circuit Court, Southern District of New York.

In the Matter of the Application of EISNER & MENDELSOHN as to Certain Importations Made by Them per "Thingvalla," Sept. 5, 1891, and the "Island," Oct. 6, 1891. } No. 935.

To the circuit court of the United States for the southern district of New York:

The undersigned, a general appraiser, under the act of June 10th, 1890, to whom it was referred by this honorable court by an order made July 9, 1892, to take further evidence in the above-entitled matter, do hereby return such further evidence taken by me pursuant to such order.

Dated, New York, December 7th, 1892.

GEORGE H. SHARPE,
United States General Appraiser, as an Officer of the Court.

NOTE.—Orders extending the time within which further testimony can be taken in the above case, were made on Sept. 7 and Oct. 7, 1892.

23 United States Circuit Court, Southern District of New York.

In the Matter of the Application of EISNER & MENDELSOHN for a Review of the Decision of the General Appraisers in the Matter of Certain Merchandise Imported by Them per the "Thingvalla," Sept. 5, 1891, and the "Island," Oct. 6, 1891. } No. 935.

NEW YORK, *Nov.* 23, 1892.

Appearances: For the importers, Dudley, Michenor & Ray. For the collector, Thomas Greenwood, assistant U. S. attorney.

MAX J. BREITENBACH, being duly sworn, testifies as follows:

By Mr. RAY:

Q. Mr. Breitenbach, will you state your business, and how long you have been engaged in it?

A. I am a retail pharmacist of this city, and have been engaged in business in this city for 18 years.

Q. Are you familiar with the classification of the various extracts of malt, and what are known as commercial extracts of malt?

A. I am.

Q. Will you state what they consist of?

A. The extract of malt, which is known commercially as extract of malt, is that which is made according to the Pharmaco-

24 pœia, which is recognized as a standard authority in this country. Both the Pharmacopœia of the Prussian government and several other foreign governments, and the Pharmacopœia of the United States, specifies an extract of malt as one of a semi-

solid syrupy consistency, containing no alcohol, and is an extract of barley malt purely.

Q. Under what commercial classification would you place Hoff's malt extract?

Counsel for the collector objects to that question, on the ground that it is immaterial how the witness classifies it, as the question simply calls for the opinion of the witness, and not for any trade classification.

The objection is overruled.

WITNESS: I consider it as a proprietary medicine.

Q. Are you familiar with its designation among the trade?

A. How do you mean?

Q. Its commercial classification by the trade?

A. We buy it the same as we buy any patent medicine, and we sell it the same as we sell any patent medicine.

Cross-examination by Mr. GREENWOOD:

Q. Is this malt extract you refer to the particular malt extract in suit?

A. Yes, sir; the Hoff's malt extract.

Q. You have given the definition of malt extract, have you not?

A. Yes, sir. I don't know as I have given a definition. I have told what malt extract was. I have told what we consider is malt extract.

Q. When you say "we," what do you mean?

A. Our profession. I am a graduate of the New York College of Pharmacy and have my degree, just the same as the college gives to all its graduates.

25 Q. Your place of business is where?

A. 591 Madison avenue, corner of 57th street. Until two months ago I had an additional store on the Bowery, corner of Canal street.

Q. This definition of malt extract given by you is a definition taken from where?

A. Pharmacopœia.

Q. Is that the understanding of the term "malt extract," in your business?

A. Malt extract must be recognized by the Pharmacopœia, taken as a standard. Pharmacopœias are always taken as a standard.

Q. That is the only article that is bought and sold, or meant in your profession and business?

A. As commercial extract of malt, yes, sir.

Q. That is the only thing that is bought under the name of malt extract?

A. Under the name of malt extract or beer?

Q. Of malt extracts?

A. Of liquid malt extract.

Q. The article involved in this case is called, I believe——

A. Johann Hoff's malt extract, or Johann Hoff's malted beer.

Q. It is labeled and advertised as malt extract?

A. Yes, sir.

Q. What malt extract is put upon the market of the kind that you have stated, the process of manufacture of which is found in the Pharmacopœia?

A. I don't know whether manufacturers confine themselves strictly to the Pharmacopœia, but I can hardly give you the process of the Pharmacopœia. I don't know whether any particular manufacturer goes by that. If a malt extract was given to me, and I had examined it and found it to have been made according to the Pharmacopœia, minus the alcohol, I should consider it as malt extract.

Q. Do you know of any so-called malt extract, that is manufactured and put upon the market by any one, the formula to which would answer to that you say is given in the Pharmacopœia?

26 A. I know one of the imported, and I know several in this country, which, from their consistency, I should judge, were made according to the Pharmacopœia.

Q. This imported one is what?

A. Loeflund's malt extract. That is proprietary, because he claims that he makes it according to his formula. It is the formula originated by Baron Justus Liebig.

Q. Did you ever analyze that?

A. Nothing more than to try it for its diastasic properties, converting starch into sugar, and as regards its containing alcohol.

Q. You know nothing more about it than that?

A. I know the process of manufacture.

Q. Have you seen it manufactured?

A. Never have; but I know from correspondence how it is made.

Q. That is, by hearsay information?

A. I know from correspondence I have had, and it is in the Pharmacopœia.

Q. Is there any other malt extract put up that you know of?

—. There are some in the market where the consistency is the same. I would not say that it was made strictly according to it, because the taste and the color differs, but I should judge that it is in a measure caused by the vacuum pans.

Q. Then you have no real knowledge, but simply an opinion?

A. I have no knowledge of any others made. I have made malt extract in a small way myself, but not in large quantities.

Q. There are various articles put upon the market that are known and bought and sold as malt extracts, are there not?

A. There is always a name specifying the malt extract.

Q. Please answer my question. Are there not various articles put upon the market that are known and bought and sold as malt extracts?

A. There are a number of them sold as malt extracts.

Q. And they are known as malt extracts?

A. Yes, sir; such as Palmer's malt extract; Park Davis' malt extract, and so on.

27 Q. And Johann Hoff's malt extract?
A. Yes, sir.
Q. Some of these malt extracts are imported articles?
A. Yes, sir.
Q. You have spoken about proprietary medicine; what is your understanding of that?
A. Anything which is made, the formula of which is not published, and which bears any one man's make, I consider proprietary goods. I consider that as soon as a name is affixed that they are proprietary goods.
Q. Do you know of any malt extract that is not according to your definition of proprietary medicine a proprietary medicine?
A. Yes, sir; there are dry extracts of malt.
Q. Put up by whom?

Counsel for the importers objects to the question.

WITNESS: There is a firm in Europe, Merck & Co., that put up a malt extract; and the extract made by Breitenbach & Co. is a commercial malt extract. As soon as a man's name is attached to it, as John Smith's malt extract, in my opinion it is a proprietary article.
Q. To go back to my question. Do you know of any malt extract that is put upon the market that is not according to your definition of proprietary medicine a proprietary medicine?
A. Yes, sir.
Q. What?
A. I have bought Loeflund's malt extract without any name to it—simply malt extract.
Q. Is that, or is that not, according to your definition, a proprietary medicine?
A. I can hold that anything with any man's name attached to it is proprietary, because he alone can make it. If I buy an extract that is made according to the Pharmacopœia, I would consider that extract of malt, but as soon as some one makes it and sends it with their name, I consider that proprietary.
28 Q. Do you consider Loeflund's a proprietary article?
A. No; I can buy that by the barrel and bottle it myself.
Q. Is that prepared according to the formula?
A. According to Baron Liebig's formula.
Q. Is that a secret formula?
A. No, sir; it is in the German Pharmacopœias and in the American Pharmacopœia.
Q. Is it a proprietary article, or is it not?
A. No, sir; it is a public property.
Q. Do you know of any other malt extract?
A. I have not tried to get any other.
Q. Do you know of any other?
A. I don't know.
Q. But you think Liebig's malt extract is not a malt extract?
A. No, sir; it is not a proprietary article.

Q. That is the only malt extract that you know of that is, according to your definition, not a proprietary article?

A. That is the only one, according to my knowledge, that can be purchased, that is not a proprietary article.

Q. I have used the term "article"—you understand by that a preparation, do you not?

A. Yes, sir.

Q. In this Johann Hoff's malt extract is there any alcohol?

A. I think there is; but I don't know how it is made.

Q. But your impression is, that it contains alcohol?

A. Yes, sir; because I don't think it would keep without it.

By the REFEREE:

Q. Why; because it is so thin?

WITNESS: That is one reason, and I suppose the other reason is because there are some other ingredients in it. I am under the impression, though I have never seen it in a formula, but I think there is some other ingredients in it.

29 ANDREW J. DITMAN, being duly sworn, testifies as follows:

By Mr. RAY:

Q. Mr. Ditman, will you state the business in which you are engaged, and the opportunity you have had of informing yourself as to the commercial designation of malt extracts?

A. I am a retail apothecary, at the corner of Broadway and Barclay streets. I have been in business there for 25 years. Our experience as dealers in malt extracts has been in selling various malt extracts as proprietary articles, as well as buying and selling and using the malt extract as a commercial article.

Q. You consider yourself, from your experience and general knowledge, competent to state what is known to the trade as commercial malt extract?

A. Yes, sir.

Q. What comes within that classification of commercial malt extracts, or what is known to commerce as malt extract?

A. An article of a semi-solid consistence, thicker than ordinary molasses or glucose. That is the general article of commerce. There is also a dry malt extract that comes in the form of powder.

Q. Does that also come within the classification of commercial malt extract?

A. Yes, sir.

Q. I have here an extract of malt, which I show you?

A. That is what is known as dry extract of malt. That is imported in bulk. We specify that as a powdered extract of malt, by way of distinction from the ordinary commercial article.

Counsel for the importers offers the bottle in evidence. It is marked, "Lehn & Fink, extract malt, dry, powd., New York."

It is identified in evidence as Exhibit "A."

Q. How is this imported—in bottles?

A. We have had it in 25 and 50 lb. cans. It may be imported in barrels, for all I know.

Q. How is this known in trade?

A. As dry extract of malt.

Q. I show you a package or a bottle, that I now offer in evidence, and ask you as to your familiarity with it, whether it is known to you and how it is known to the trade?

A. Yes, sir; we are familiar with this article.

Counsel for the collector objects to the admission of the package in evidence, it not appearing from any testimony what it is, and it not appearing that it is relevant to any issue in suit.

The objection overruled

The package is identified in evidence as Exhibit "B."

Q. State what it is?

A. This is an extract of malt in the condition that I have it here. It is known as Trommer's extract of malt, a proprietary article, manufactured at Fremont, Ohio. This is an extract of malt of a semi-fluid consistence.

Q. Will you give your reason for placing that in the line of proprietary articles—you say in this form as presented?

A. It is a preparation that possibly no one else would make exactly the same thing; in other words, it is a secret formula that these people have for their preparation.

Q. Are they articles or are they not articles of a similar consistency which can be bought in bulk and which do not come within your definition of dry medicine?

A. Yes, sir. We get, for instance, from Park Davis, an extract of malt of about the same consistence. We can get that in bulk or by the gallon; also of Keasby & Matteson of Philadelphia.

Q. Are you familiar with the article under this protest, in reference to which the question of customs duty is involved in this case—Johann Hoff's malt extract?

A. Yes, sir.

Q. How is that known in commerce?

A. As a proprietary article.

Q. Do you deal in it as a proprietary article?

A. Quite considerably; yes.

Q. Did I understand you in saying that the article of the same consistence as Exhibit "B" was on the market as a commercial article, the distinction being here that a name is attached?

A. Yes, sir.

Cross-examination by Mr. GREENWOOD:

Q. Mr. Ditman, you heard the other witness testify about Liebig's malt extract; did you not?

A. Yes, sir.

Q. What is that—a powder?

A. It is in the form of a paste—semi-fluid—about the same consistence of this Exhibit "B."

Q. Is it bought by the pound, or how?
A. By the gallon.
Q. Is it imported in bottles?
A. Liebig does not exist, and these goods are simply made by a process that was invented by Liebig. He is not a manufacturer at the present time, but different people manufacture malt extract by this process and bottle it. My predecessor here referred to Loeflund's. He puts it up in a small way and labels it "Loeflund's Liebig's malt extract." Probably there are other large manufacturers. For instance; some of the malt extracts that has been referred to here that comes in barrels, is undoubtedly made by the same Liebig process.
Q. Liebig's malt extract so called, or the malt extract made according to Liebig's formula, is sold by the gallon, is it not?
A. Yes, sir. This malt extract that is made by Park Davis, is undoubtedly made by Liebig's formula.
Q. Does that come in casks or barrels?
A. In barrels, I think.
Q. You don't think it is imported in bottles?
A. No.
Q. The dry malt is that sold as a malt extract?
A. Yes, sir.
32 Q. You don't recognize any difference between malt extract and extract of malt?
A. No, sir.
Q. Is the dry malt extract sold by the pound?
A. Yes, sir.
Q. Not sold by the gallon?
A. Sold by the pound.
Q. The semi-solid you say is sold by the gallon and not by the pound?
A. Yes.
Q. It is not bought and sold by the pound?
A. It is bought and sold by the gallon.
Q. This Exhibit "A" is sold by the pound?
A. Yes, sir.
Q. Exhibit "B," the domestic article, is sold——
A. By the bottle.
Q. What is that?
A. Semi-fluid.
Q. This particular article is not imported?
A. No.
Q. You have given me, I believe, a definition of proprietary medicine?
A. In a general way; probably I have not had a specific question.
Q. Please give a definition of it, as you understand it in trade and commerce; as it was understood on October 1, 1890, and prior thereto?
A. Articles that are manufactured by a secret process, that is, where the formula is not given, and usually advertised or known

with a specific name, either the name of the manufacturer or some trade name. Powers & Wakeman are manufacturers of quinine. That article comes in the market as Powers & Wakeman's quinine. You would not know that as a proprietary article, because it is not manufactured by a secret process.

Q. What malt extract is there put upon the market that would not be a proprietary article, or medicine, or preparation, according to your definition?

A. These same people whom I have referred to, Park, Davis & Co., put their malt extract on the market. I don't recall their labels exactly. That differs from the Johann Hoff's malt extract in that it is a semi-fluid and not a liquid extract.

Q. You understand that Johann Hoff's malt extract is a fluid and not a semi-solid?

A. Yes, sir.

33 Q. You don't understand that the malt extract of Park, Davis & Co., according to your definition, is proprietary?

A. No, sir.

Q. Do you know of any other malt extract that is not a proprietary preparation?

A. The one I have referred to of Keasby & Matteson. They put theirs up in bottles holding about a pint.

Q. Those two are the only malt extracts put upon the market that are not proprietary preparations, according to your definition?

A. There are numbers of them that I don't recall just now. Pretty much every manufacturer puts up a malt extract.

Q. Do you consider these proprietary preparations?

A. No, sir.

Q. Are these malt extracts that you have spoken of as not being proprietary preparations, made in this country or are they imported?

A. I think most of them are made here.

Q. Do you know of any imported malt extract that is not, according to your definition, a proprietary preparation?

A. I do not.

Q. You never have known any being imported during your experience of 25 years, that were not proprietary preparations?

A. No, I don't know of any, excepting the dry malt extracts. They would not be considered a proprietary article.

Q. And these are sold by the pound?

A. Yes. That that has been referred to and known as Loeflund's, I should consider as a proprietary article.

Q. Loeflund's Liebig's malt extract?

A. Yes, sir.

Q. So that all the malt extracts that are brought into this country, and that have been during your experience of 25 years, according to your notion of the meaning of proprietary preparations, are called, and have been called, proprietary preparations?

A. Yes, although they have come under a specific name other than extract of malt. For instance, when this man Loeflund bottles this extract of malt, he calls it Loeflund's extract of malt.

34 Q. There is no imported, or has been no imported malt extract that was not, according to your idea, a proprietary preparation?

A. Yes; this Johann Hoff's malt extract, I should consider as a proprietary article.

A. There have been none imported but what are proprietary articles, according to your idea?

A. None.

Q. I show you the United States Pharmacopœia of 1882, published by authority of the national convention for revising the Pharmacopœia, held at Washington in 1888, and call your attention to the definition on page 132 of *extractum malti*, and ask you if there has ever been, to your knowledge, an article imported which, according to your judgment, was put up according to that formula?

A. Yes. There has been a malt extract imported that would agree with a product made from this formula.

Q. Whose?

A. I can testify only to my individual knowledge. Not having seen and handled such an extract, I could not say.

Counsel for the collector offers in evidence the definition of *extractum malti*, of the U. S. Pharmacopœia, hereinbefore mentioned. It is as follows:

"*Extractum malti.*

Extract of malt.

Malt in coarse powder, not finer than No. 12, one hundred parts—100.

Water, a sufficient quantity.

Upon the powder, contained in a suitable vessel, pour one hundred (100) parts of water, and macerate for six hours. Then add four hundred (400) parts of water, heated to about 30 C. (86 F.), and digest for an hour at a temperature not exceeding 55 C. (131 F.).

Strain the mixture with strong expression. Finally, by
35 means of a water bath, or vacuum apparatus, at a temperature not exceeding 55 C. (131 F.), evaporate the strained liquid rapidly to the consistence of thick honey.

Keep the product in well-closed vessels, in a cool place."

Redirect examination by Mr. RAY:

Q. In stating that you know of no imported extract of malt that comes within the commercial definition, do you mean that the simple affixing of a name to an extract of malt, which is made under Liebig's formula, would make it a proprietary medicine?

A. No.

Q. As I have understood your testimony, you believe there is an extract of malt imported into this country which is manufactured according to Liebig's formula?

A. I understand that there is. I don't know from my own actual experience.

Q. From your experience in the trade, you know there is an article that passes for the extract of malt, which is reputed to be made under Liebig's formula, and that it is imported?

A. Yes, sir.

Q. And that the mere attaching of some name to it would not change its character as a commercial extract of malt, if there was no other addition?

A. Yes, sir.

Q. And that article is imported in that condition?

A. Yes, sir.

Q. You do not consider that the mere attaching of a name to an article that is put up in accordance with a certain formula, gives it a different commercial character, when the formula itself is published and known to the trade?

A. Everything would depend upon the style of the label. If Liebig's extract of malt is imported in bottles, and it is stated on the label "Extract of malt, Liebig's," we understand that it is Liebig's extract of malt.

36 Q. And there are importers of that in that form?

A. I understand that there are, but not of my individual knowledge.

Q. What would you say to an article imported, labeled in the form of the article which I now offer in evidence, this being the malt extract in suit, taking the entire label with its specific recommendations and statements?

A. I should say that this was a proprietary article.

The article offered in evidence is identified as Exhibit "C."

Recross-examination by Mr. GREENWOOD:

Q. Does any formula, so far as you have ever seen or known, come with this article in suit, that is put upon the market?

A. No.

Q. These preparations of Liebig's malt extract, about which you have been asked, do they have any trade-mark upon the bottle, or the envelope containing it; these preparations which have been bottled by other parties?

A. I think they do.

Q. Would, or would not, the presence of a trade-mark on a preparation of the different kinds used in your business, make that preparation a proprietary one?

A. I should think it likely to be considered so.

Q. And you would so consider it?

A. Yes, sir.

ALFRED H. KENNEDY, being duly sworn, testifies as follows:

By Mr. RAY:

Q. Mr. Kennedy, will you state your business, and the opportunities you have had of familiarizing yourself with it?

A. Engaged in the apothecary and druggist sundries business.

Q. What length of time have you been so engaged?
A. 28 years.
Q. In what capacity are you now employed?
37 A. I am a member of the corporation, the Charles N. Crittenton Company of this city. My duties are as a buyer.
Q. Are you familiar with the Exhibit "C" in this case?
A. Yes, sir; I am.
Q. And what do you place that as?
A. As a proprietary article.
Q. Do you know of any goods that are known as commercial extracts of malt, that are on the market?
A. There is an extract of malt that is imported, but we do not handle it.

Cross-examination by Mr. GREENWOOD:

Q. That extract of malt you have just referred to as imported, is it in powder?
A. Only in powder that I know of.
Q. Sold by the pound?
A. Sold by the pound.
Q. Your attention has been called to the contents of Exhibit "C." Do you know whether or not, alcohol is a component part of that?
A. I do not.
Q. According to your opinion, is or is not alcohol a component part?
A. I could not say. Not knowing what the contents are, or from what formula it is made, I could not say whether there is alcohol in it or not.
Q. Do you know the formula from which that is made?
A. I do not.

Redirect examination by Mr. RAY:

Q. Is the formula public, that you know of?
A. Not that I know of.
Q. Is it known among the trade in any other manner than as a proprietary medicine?
A. No, sir.
Q. How is it advertised?
A. As Johann Hoff's extract of malt.
Q. As an article of commerce, or as a proprietary article?
A. As a proprietary article, for medicinal purposes.

38 Recross-examination by Mr. GREENWOOD:

Q. Bought and sold, and has been ever since you knew it as a malt extract?
A. Yes, sir; Johann Hoff's malt extract.
Q. The "Johann Hoff" simply indicates the man who makes it, or the same of the man who originated it?
A. I should judge that it indicates the name of the man who makes it, or possibly he may be a successor.

Q. But it has always been bought and sold as a malt extract—as one of the malt extracts?

A. On the market known commonly as Johann Hoff's malt extract.

Q. When you come to specify it?

A. When you come to specifications, there are a number of malt extracts sold on the market, and one of the distinguishing features is in the name.

Q. As Brown's, for instance?

A. As Brown's, John Doe's, or Jones' malt extract.

By Mr. RAY:

Q. In speaking of its being sold on the market as a malt extract, do you mean as a commercial malt extract?

A. No, sir. I qualified my answer at the time I made it.

By Mr. GREENWOOD:

Q. They are all known and bought and sold as——

A. As malt extracts. I might give you a case. When they are ordered by our customers, they would send for some one particular extract of malt. They would not say, give me a dozen bottles of malt extract; but they would say, give me a dozen bottles of Johann Hoff's malt extract, or Park, Davis & Co., or Trommer's.

By Mr. RAY:

A. As I understand you, you don't keep the commercial malt extract?

A. No, sir.

39 By Mr. GREENWOOD:

Q. But you do keep some malt extracts?

A. A. Yes, sir; malt extracts that are put up as proprietary preparations.

Q. Then, by commercial malt extract, which you say you do not keep, you understand what?

A. All articles are articles of commerce that we know of. Exhibit "C," as it stands, is an article of commerce. Any commodity passing from one business to another, or one house to another, is a commercial article in its true sense, but probably in the sense that you want, it is not. As I understand you, you want to get from me as to whether we have an extract of malt that is not a proprietary article. If that is what you want, I ask you to state the question. We don't have the commercial extract. We don't handle it.

Q. What do you understand by commercial malt extract?

A. Everything is a commercial article. Do you mean by your question more particularly, that without a distinguishing mark?

Q. You have used the term "commercial malt extract." What sort of malt extracts does your house keep?

A. Just the proprietary.

Q. Then, as I understand you, you regard those malt extracts, which are not proprietary, as not commercial?

A. Yes, I should judge that they were commercial.

Q. Then you regard the proprietary malt extracts as not commercial?

A. Not in the sense that you mean. Here is one question that can be applied the same way to both articles.

Q. Do you deal in Johann Hoff's malt extract?

A. Yes, sir.

Q. Any other malt extracts?

A. Yes, sir.

Q. Whose?

A. Trommer's malt extract, Park, Davis & Co.'s malt extract, Keasby & Matteson's malt extract, and Horlick's malt extract.

40 DANIEL R. CHICHESTER, being duly sworn, testified as follows:

By Mr. RAY:

Q. Will you state what effort you have made in the market to purchase what is known as commercial malt extract?

Counsel for the collector objects to the question, because this witness has not yet testified as to what commercial malt extract is; and objected to further, on the ground that the question is entirely immaterial and irrelevant to any issue in the case.

The referee allows the evidence to be taken, subject to the objection.

WITNESS: I went to Merck, and I asked for a pound of malt extract. They did not ask any questions, but gave me a bottle. This is it. (Witness produces a bottle.) They charged me two dollars, and that is all that was said. Merck is a wholesale druggist, at No. 73 William street, in this city.

Counsel for the importers offers the bottle in evidence. It is identified as Exhibit "D."

Q. Did you make another application anywhere; and, if so, state?

A. From Merck's I went to Lehn & Fink's, wholesale druggists at No. 128 William street, this city, and I asked for a pound of malt extract, which, in return, they gave me this. (Witness refers to Exhibit "A," which has been offered in evidence), and they charged me one dollar and twenty-five cents for it.

By Mr. GREENWOOD:

Q. The contents of Exhibits "A" and "D" are powders, are they not?

A. As far as I know, I have not seen them. They look as if they were powders.

41 Q. And not as if they were liquids, or semi-liquids?
A. No, sir.

MORITZ EISNER, being duly sworn, testifies as follows:

By Mr. RAY:

Q. Will you state your business?
A. I am an importer of drugs, mineral waters, and have been a druggist for the last 25 years.
Q. Where?
A. In Europe, Philadelphia and New York.
Q. Will you state what opportunities you have had to familiarize yourself with the commercial definition of extract of malt?
A. I have been actively engaged as a druggist and chemist, and have been working in laboratories here and abroad; have manufactured, and bought and sold extracts of malt myself, and have been importing Johann Hoff's malt extract for the last 15 years, and selling various malt extracts.
Q. As a wholesale druggist, will you give the definition of malt extract, as known to trade and commerce?
A. Trade and commerce understands by malt extract a semi-solid preparation, which is the cold extraction of barley evaporated in vacuum. In later years, through the improvement of science, this was, by further evaporation, brought down to powder, and, in fact, now the trade generally accepts the dry extract of malt as a commercial article, as a real extract of malt. Pharmacists recognize that as an article of commerce, and I believe that in the new Pharmacopœia that will come out, the dry extracts will be contained therein; because both of them are today looked upon as the true extracts of malt.
Q. Both the dry and the liquid?
A. Both the dry and the semi-liquid.
Q. You state that you have been engaged importing and selling Johann Hoff's malt extract—how has that been offered to the public?
A. Always as a proprietary article, recommended for vari-
42 ous diseases.
Q. Have you the circulars and labels which are placed upon the bottles of Johann Hoff's malt extract, and if so produce them?

Witness produces the label which comes around each bottle.
It is offered in evidence and marked Exhibit "E."
Witness produces the circular which is wrapped around each bottle.
It is offered in evidence and marked Exhibit "F."
Witness produces a pamphlet used for advertising the article.
It is offered in evidence and marked Exhibit "G."
Witness produces another pamphlet used for advertising.
It is offered in evidence and marked Exhibit "H."

Q. Under what head do you place Johann Hoff's malt extract—whether as an article known to commerce as a malt extract, or as a proprietary medicine?

Counsel for the collector objects to the question, on the ground that it calls for the opinion of the witness.

The referee allows the evidence to be taken, under counsel's objection.

WITNESS: I always looked upon it as a proprietary article. Under the former tariff, the department made a decision that it should be classified as a proprietary article. We did not protest that, because, in fact, we looked upon it and believed it to be a right decision at the time.

43 Counsel for the collector moves to strike out the testimony of the witness, beginning with the words, "under the former tariff," on the ground that it is not responsive to the question.

Motion denied.

WITNESS. The trade all over the country, both here and abroad, classified it as a patent medicine or proprietary article, manufactured under a secret process known to Johann Hoff, or those in the firm of Johann Hoff, and to no one else—a preparation that has been made according to Johann Hoff's own idea and notion of a malt extract, and which he brought into the market under the name of Johann Hoff's beer of health, and recommends it for diseases of the stomach, liver, for hemorrhoids and general debility.

Q. You say it is a secret preparation?

A. Yes, sir.

Q. Manufactured under a formula not known to the public?

A. Yes, sir.

Q. I am not asking you, if you know it, to state the formula, because, of course, that is a trade secret, but I ask you whether you know of the formula personally?

A. Yes, sir.

Q. You have acquired that knowledge as a purchaser?

A. Yes, sir; in the firm itself.

Q. Will you state whether or not any alcohol is used in the preparation of this extract?

A. No, sir. The alcohol contained therein is produced by internal fermentation. The difference I can state without disclosing the formula. The difference between this article and the article of commerce, is that the malt extract of commerce is made by a cold infusion of barley without any other addition; this is made by a hot infusion of barley, to which is added various other ingredients which never enter into the composition of malt extracts.

Q. Can you state generally what these ingredients are?

A. They are herbs, roots and leaves, which are nowhere found in any other product.

44 Q. What proportion of malt extract, as known to commerce, is contained in this Johann Hoff's malt extract?

A. 12 per cent.

Q. What amount of alcohol is contained in this, that is, as naturally developed?

A. A trifle less than 3 per cent. The manufacturer's greatest aim is to get as little alcohol as possible in it. For the diseases that this article is recommended, alcohol should be avoided, but it cannot be entirely avoided in making the preparation, as it is necessary for its well-keeping. It is not artificially introduced, but is produced by natural fermentation.

Q. By whom is this preparation in suit prepared and sold?

A. It is prepared by his firm, the firm of Johann Hoff, at Berlin, and shipped over to us.

Q. Are they the originators of it, or the successors?

A. The present firm is the successor, Johann Hoff himself having died several years ago.

Q. Are the present members of the firm of the family of Johann Hoff?

A. Yes, sir; they are his sons.

Q. How long ago was this introduced?

A. I have known it personally for 25 years, but it has been on the market a great many years before that.

Q. Is it offered for sale in any other form or with any other labels than this?

A. It is not offered for sale in any other shape than the bottle here in suit—the same style of bottle and the same style of labels. The label only varies as to the country where it is exported to; it may be Spanish and so on.

Q. Have you any medical authority defining Johann Hoff's malt extract?

A. Hager's Manual of Pharmaceutical Practice is a work published in Germany, in Leipsic, I believe, gives it.

Q. Is it a book known to the public?

A. Usually used for reference by druggists throughout the world,

Q. Have you the definition given there?

A. Yes, sir.

45 Q. How did you obtain it?

A. I obtained the definition of it by copying it and translating it from the book myself.

Q. Will you produce that definition?

(Witness produces a typewritten copy of the definition.)

WITNESS: I could not take that book, because it belongs to another party. I copied it and translated it myself. I had this identical book before the general appraisers.

Q. Is this translation an accurate one?

A. I believe it to be as accurate as I can make it.

Q. Do you consider yourself competent to make such a translation?

A. Yes, sir.

Q. You are familiar with both the German and the American language?

A. Yes, sir.

Q. You are also familiar with the scientific terms used by the profession and by druggists?

A. Yes, sir; very familiar.

Counsel for the importers offers the definition in evidence, as shown by the typewritten copy.

Counsel for the collector objects to its admission in evidence, on the ground that it professes to be a copy and translation of a definition given in the book stated in the paper offered in evidence, which book is not now produced, and no opportunity is given of verifying it.

The referee sustains the objection, and upon counsel for the importers insisting upon its admission, it is admitted subject to rule XI.

The copy of the definition is identified in evidence as Exhibit "I."

Q. I hand you Exhibit "H" and ask you what knowledge you have as to the authenticity of that certificate, and whether the original can be produced or not?

A. This letter is by Dr. Henry Leffman. I had the original in hand myself when it was received some time in October, 1889, and gave it to Samuel H. Hall of this city to make fac-simile copies of the same similar to the one that I herewith produce.

46

Counsel for the importers offers in evidence the paper produced by the witness.

The paper is marked Exhibit "K."

WITNESS: The original letter was lost by the printer, but this is an exact fac-simile.

Q. Mr. Eisner, what do you know in reference to the importation of what is known as commercial malt extract?

A. I know that the commercial malt extract is imported in bulk and in bottles. I have imported some myself of the dry extract and semi-liquid extract in jars—stone jars—25 and 50 lb. jars. I have imported from Gehe & Co., of Dresden, commercial malt extracts, both the semi-liquid and the dry; and I have imported of H. Trommsdorf, in Erfurt, and of Merck, in Darmstadt.

Cross-examination by Mr. GREENWOOD:

Q. This article in suit, Exhibit "C," is malt extract, is it not?

A. According to Johann Hoff's idea.

Q. You sell it under the name of malt extract?

A. We sell it as Johann Hoff's malt extract.

Q. It is known in the market as a malt extract, and has been, has it not?

A. In the trade they all look upon it as a proprietary article.

Q. They buy it as a malt extract and sell it as a malt extract, do they not?

A. They buy it as Johann Hoff's malt extract, which is a proprietary article.

Q. Do customers go into a store and ask for so many bottles of proprietary medicine?

A. No, sir.

Q. You never received an order in which the term was used?

A. No.

Q. You never knew of any one to sell it under the name of a proprietary medicine?

47 A. No; that is a classification. Proprietary article is a classification of things. The trade and customers all over the world call it Johann Hoff's malt extract. Coming into the store they would get what this little boy had got. (Witness referring to Mr. Chichester, the last witness.)

Q. You have used the term "commercial malt extract." What is that?

A. I meant the semi-liquid substance, the thickness of honey, or syrup, or a dry powdered substance.

Q. The dry powder is sold by the pound, is it not?

A. Yes, sir.

Q. How is the other sold?

A. Just the same. You can buy it by the barrel, or in jugs, as I have bought it, and you can by it in bottles.

Q. Is it imported in bottles?

A. There are some imported in bottles also.

Q. And the dry?

A. Also the dry is imported in bottles.

Q. And the other is imported——

A. The semi-liquid is also imported in bottles.

Q. What malt extract, according to your idea, is not a commercial malt extract?

A. Johann Wyeth's. I would call it a proprietary article, because its formula is secret.

Q. Then, as I understand you, you mean by commercial malt extract, a malt extract that is put up as a proprietary article or proprietary preparation?

A. Not at all. The malt extract of commerce is the one that is made according to Baron Liebig's formula. He was the inventor of malt extract.

Q. Then, as I understand you, malt extracts may be divided into two classes, commercial malt extract and non-commercial malt extracts?

A. They may be properly.

Q. The non-commercial malt extract is prepared according to Baron Liebig's formula?

A. Just the opposite.

Q. The other malt extracts, according to your idea, are non-commercial malt extracts?

48 A. I would not say that. If Hoff, for instance—if his was a malt extract in the proper sense of the word, which it is not, and put upon the market in any quantity so it would be a commodity, and you would sell it by the gallon or the pound, that would be a commercial article.

Q. According to your idea?

A. Yes, sir.

Q. Any malt extract, then, that is put up in a bottle, that you can sell in the quantities that you speak of, you regard as a non-commercial malt extract?

A. Not at all. I do not regard Trommer's Exhibit "B" as a proprietary article. It is only made proprietary in the name, Trommer being the manufacturer of the article.

Q. Do you regard that as non-commercial?

A. Trommer has the exclusive right of making this very identical article.

Q. Then you regard it as non-commercial?

A. Yes, sir.

Q. Then, according to your idea, malt extracts, which are proprietary preparations, are non-commercial malt extracts?

A. Yes, sir.

Q. The other malt extracts, according to your idea, are the malt extracts of commerce?

A. Yes, sir. I would state here, that a person should inquire into the article itself. I would not take the label or general appearances. I would inquire into the article. What is a malt? It is a cold infusion of barley. Exhibit "C" is not a cold infusion of barley.

Q. Then, according to your idea, the malt extract of commerce is simply——

A. A cold infusion of barley, either reduced to a semi-liquid form or dry.

Q. Nothing else?

A. Nothing else.

Q. Nothing else is a malt extract of commerce?

A. No, sir.

Q. In what form?

A. It does not make a particle of difference whether it comes in liquid, or thick like, or in powder. If it is not a cold infusion of barley reduced in a vacuum, it is not a malt extract.

49 Q. The commercial or the malt extract of commerce, as you understand it, is imported in what shape?

A. It is imported in bulk, and it is manufactured here in this country.

Q. In what?

A. I have never imported any different than in jugs and in bottles. I don't know what other people do.

Q. What kind of bottles?

A. Glass bottles; quarter-pound, half-pound, pound, and five-pound bottles.

Q. That is, it is imported and bought by the weight?

A. Yes, sir.

Q. Entirely.

A. It is not bought by the weight entirely for commercial purposes. By other trades other than the drug trade, it may be by the gallon.

Q. How is it imported?

A. By the pound.

Q. So far as you know, is that the only way?

A. I don't know. By other trades it may be sold in hogsheads, or in barrels, or by the gallon.

Q. But that you don't know?

A. No; because I refer to a poor extract of malt. There may be a low grade of malt extract.

Q. So far as you know, it is imported and invoiced by the pound?

A. That is the only way I have imported it.

Q. And that is the only way that you know of its actually being imported?

A. That is the only way I have ever imported it.

Q. You don't know of its being imported in any other way?

A. I don't know.

Q. And that is the malt extract, that you say is the malt extract of commerce?

A. Yes, sir.

Q. You are familiar, as a chemist and as a druggist, with medicines, or medical preparations that contain alcohol?

A. Yes, sir.

Q. About what percentage of alcohol is usually put into medicines or medicinal preparations?

A. It is not necessary to put any alcohol into medicinal preparations.

Q. I was referring to medicinal preparations that contain alcohol.

A. I have had hundreds of thousands of bottles of different
50 preparations that are medicinal, that don't contain alcohol. Medicinal preparations that contain alcohol, such as tinctures, that is what we would term medicinal, contain from about 30 to 50 per cent. of alcohol.

Q. Is that the maximum?

A. No, sir. Tincture of benzine is nearly all alcohol—from 30 to 50 to about 95 per cent. of alcohol.

Q. What is the average per cent. of alcohol in medicinal preparations? I want your judgment as a chemist and as a druggist.

A. As far as taking an average right through, I would consider the proper average of medicinal preparations, where alcohol is a component part, about 35 per cent. of alcohol.

Q. You think that is the average?

A. Yes, sir.

Q. What is the minimum?

A. It may be as low as 15 per cent. and lower than that.

Q. You know of no medicinal preparation containing alcohol, that contains less than 15 per cent. of alcohol.

A. I could not recall one now.

Q. Are you able to state whether the malt extract in suit, or an article like the malt extract in suit, can be made from this formula, Exhibit "I"?

A. No, it could not.

Q. This book, from which this formula, Exhibit "I" is taken, is a public book, is it not?

A. Yes, sir. The actual way of preparing this malt extract is a secret.

Redirect examination by Mr. RAY:

Q. Will you state why it is that it cannot be made according to this formula?

A. Because it would produce an entirely different article. While some of the articles are really contained in the formula, Exhibit "I," is a secret one, known only to the owners, which I have already stated, and it is made by a hot infusion of barley. This is a sort of diluted beer. This analysis, Exhibit "I," was made by Hager.

51 Recross-examination by Mr. GREENWOOD:

Q. Then this formula is not correct—that is, what it amounts to, is it not?

A. You can't never have a correct formula of any proprietary article.

Q. Is the article in suit a beer?

A. It is an extraction of barley, roots, and herbs.

Q. Is, or, is it not, diluted beer, as stated in this Exhibit "I"?

A. In my view, it is not a beer, because a beer is an article made of hops and malt. When it is diluted it is only diluted with water. I contend that the article is not a beer.

Q. It is not a beer, then, nor a diluted beer?

A. No; nor a diluted beer.

Q. Then this formula, Exhibit "I," is not correct?

A. It is not correct.

Redirect examination by Mr. RAY:

Q. Will you give us your explanation for saying it is not a beer, and that the formula is not correct?

A. A beer is a preparation of malt and hops. While there is malt and hops contained in this, there is at the same time a lot of herbs and roots contained therein, which makes it an entirely different preparation from any beer. Just the same, I may say, it makes it different from any malt extract.

FRANCIS WYAW, being duly sworn, testifies as follows:

By Mr. RAY:

Q. Doctor, will you state your profession and experience?

A. I am an engineer of arts and manufactures in the Central School of Paris, and doctor of philosophy at Brussels University. I have been practicing for 20 years as a consulting and analytical chemist to the brewing industry and the malting industry.

Q. Will you define what is known as the malt extract of commerce?

52 Counsel for the collector objects to the question, on the ground that the witness does not buy and sell malt extracts, so far as appears from the testimony, and never has.

The question withdrawn.

Q. What is a malt extract, and state your means of knowledge?

Counsel for the collector objects to the question, on the gronnd that the witness has not been shown to have either bought or sold malt extracts.

The testimony admitted subject to the objection.

WITNESS: A malt extract is a cold infusion of malt evaporated to a semi-solid consistence, or for the convenience of transportation, evaporated to dryness in a vacuum, at a temperature not exceeding 130 degrees Fahrenheit. Its substantial quality is its saccharifying or liquifying action on starch.

Q. Have you examined and analyzed Exhibit "C," or an article which corresponds to that?

A. I have. I can produce one.

Q. You may do so, if you please. (Witness produces an article corresponding with Exhibit "C.")

Q. What do you class that—as a malt extract?

Counsel for the collector objects to the question, on the ground that it calls for the opinion of the witness.

Objection overruled.

A. No.

Q. Will you state your reasons?

A. I regard this preparation as a medicinal beer. When I say medicinal beer, I mean a beer prepared from malted barley and hops, to which has been added various organic compounds,

53 which I have been unable to distinguish by any analytical process. It contains 2.85 % of alcohol, and 8.72 % of solid matter, of which 3.4 % is of the nature of the extractive bodies of malt. I am of the opinion, from the result of my examination, that the liquid originally contained about 10% of malt extract, of which about 5 % have been converted into alcohol by fermentation.

Q. You say 5 % of the original?

A. I said that about 5 % of the original gravity have been transformed into alcohol by fermentation.

Q. And what does that leave the per cent. of alcohol as it stands?

A. I have already stated 2.85%.

Q. I call your attention to Exhibit "A," and ask what that would be known as?

A. Extract of malt.

Q. I ask you the same question with reference to Exhibit "D."

A. Extract of malt or malt extract.

Q. And I repeat the same question as to Exhibit "B"?

A. Extract of malt.

Q. What is the difference between that and Hoff's malt extract, or between Hoff's malt extract and any of these?

A. The difference between Hoff's malt extract and these exhibits which have been shown to me, is that Hoff's is a fermented extract containing alcohol. The other extracts are not fermented, and are cold solutions of the extractive mass of barley malt.

Q. I understand that your definitions are given upon the merits of the articles themselves, without any reference to their preparation or proprietary character?

A. Without any reference to anything but to their analytic contents by themselves.

Cross-examination by Mr. GREENWOOD:

Q. You never have bought or sold any kind of malt extracts, have you?

A. No, sir.

Q. The malt extracts that you have come in contact with were malt extracts used by brewers?

54 A. To a very large extent. I have examined all the malt extracts which have been shown here as exhibits, not once, but a great many times.

Q. Your answers about malt extracts are confined to the kinds represented here, are they not?

A. No; my answer is a general one; my answer as to what constitutes malt extract is general and not specific.

Q. Your definition of a malt extract is a scientific definition, is it not?

A. It is the generally accepted definition given in the scientific text books.

Q. And you don't mean to say it is the definition given in trade?

A. Yes.

Q. But you don't know how it is used in trade?

A. No; but speaking as I do, I believe that to be the fact.

Q. You are not a buyer nor a seller?

A. No; but I might add that buyers and sellers come to me to determine whether certain articles are malt extracts or not.

No date agreed upon for a future hearing.

55 *In Re* EISNER & MENDELSOHN. No. 935.

Stipulation.

As the time within which further testimony can be taken in this case, and filed with the clerk of the United States circuit court, in pursuance to the order of said court has expired, the undersigned counsel for the importers and counsel for the collector of customs, hereby stipulate that this testimony shall have the same force and effect as though filed within the time limited by said order.

Dated, December 7, 1892.

DUDLEY, MICHENOR & RAY,
Counsel for the Importers.

EDWARD MITCHELL,
U. S. Att'y and Att'y for Collector,

Per THOMAS GREENWOOD,
Ass't U. S. Att'y, Counsel for the Collector.

Upon counsel for the importers and counsel for the collector stating that they do not wish to offer any further testimony in this case, it is declared closed.

(Endorsed:) United States circuit court, southern district of New York. In the matter of certain merchandise, imported by Eisner & Mendelsohn, per "Thingvalla," Sept. 5, 1891, &c. Suit No. 935. Further evidence, pursuant to order of July 9th, 1892. U. S. circuit court. Filed Dec. 7, 1892. John A. Shields, clerk.

(Here follow advertisements marked pp. 56 to 85, inclusive.)

86 EXHIBIT "H," No. 935.

From the Annals of Hygiene.

Henry Leffman, M. D., analytical chemist and expert, 715 Walnut street.

PHILADELPHIA, *Oct.* 26, 1889.

Messrs. Eisner & Mendelson.

SIRS: In response to inquiries made concerning the relative merits of the Johann Hoff's malt extract, and that sold under the name of Tarrant's Hoff's extract, I state as follows:

"That I have, during the past eighteen months, made a number of examinations of the principal forms of malt extract in the market, and have, among other matters, satisfied myself that the Johann Hoff's malt extract, as imported by you, is a genuine extract of malt."

The judgment of the value of a liquid preparation of malt will be largely based on the percentage of alcohol, and the presence of any preservative, especially salicylic acid. It may be justly said that the less alcohol found the better, provided its place is not taken by some more objectionable substance. Under such considerations, the Johann Hoff's malt extract possesses decided advantages over the preparation sold under the name of Tarrant's Hoff's extract, in the fact that the former contains three and one-half per cent. of alcohol, while the latter has yielded, in two samples, four and three-quarters and 5 per cent. respectively.

Further, I have noted in a number of examinations of the latter article—Tarrant's extract—the presence of salicylic acid, while I have never, in repeated examinations of the Eisner & Mendelson Johann Hoff's extract, found any trace of such preservative. The effects of the salicylic acid have been extensively studied, and the unanimous opinion of sanitary chemists is, that it is very objectionable as an addition to any form of food or drink, and especially objectionable in malt extract. From some observations made in my own laboratory, and published in the Polyclinic in May, 1888, it appears that not only does salicylic acid wholly suspend the action of diastase, to which malt owes its starch-converting power, but that the starch digesting power of the pancreatic secretion is also wholly

MALT EXTRA

ESTABLISHED 1847.

The Best Nutritive

For Indigestion, Malnutrition.

A Sovereign Remedy for the Weak, for General Debility and all

BEWARE OF IMITATIO

The genuine has the Signature of „JOHANN HOFF

EISNER" on the neck of Every Bottle.

JOHANN HOFF

Factories

Berlin, Paris, Vienna, St. Petersburg and New-

EISNER & MENDELSON Co.

Sole Agents for the U. S. of A.

6 Barclay Street ..... New-York.

Johann Hoff's Malt Chocolate plain and with Iron.

JOHANN HOFF'S MALT

A VERY PLEASANT AND ACTIVE

For Coughs, Colds and Sore

Can also be used by dissolving it in the Malt

and taken at bed-time. It will relieve all

on the Chest, Sore Throat, Colds, Coughs,

MANUF

THE UNITED STATES VS.

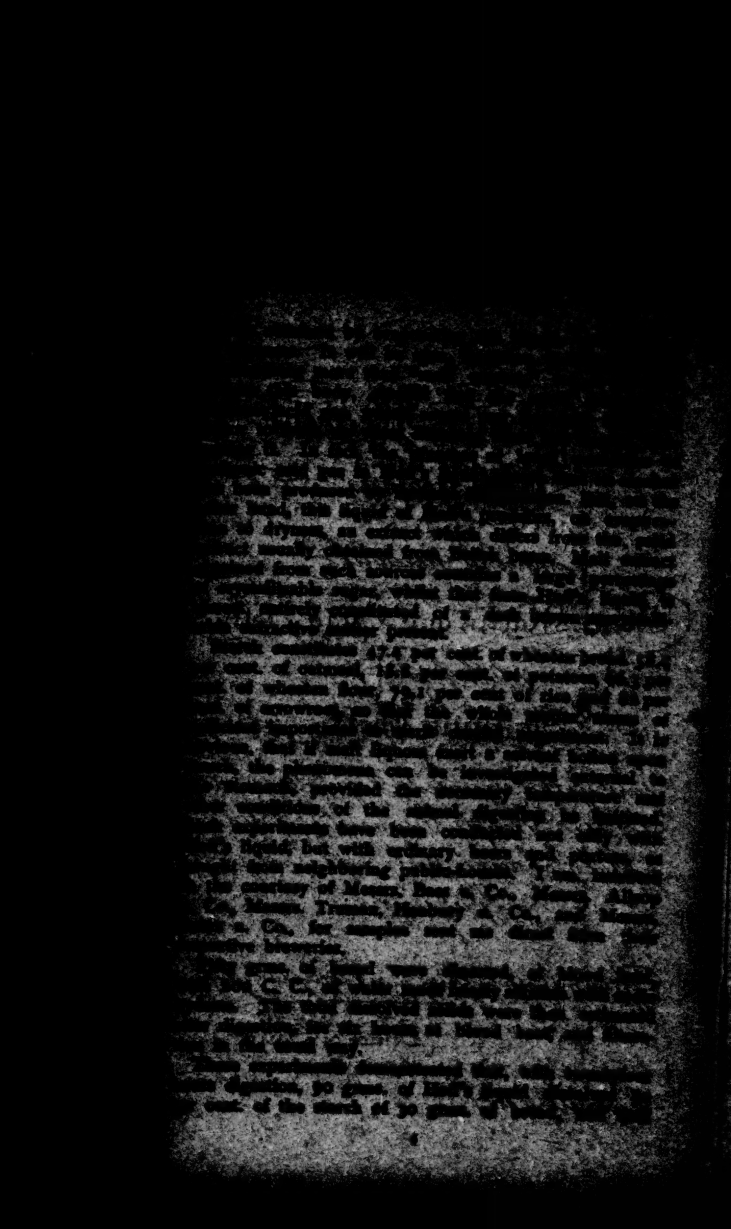
to liquorice made commanding the [illegible]
sold under the names of [illegible]
[illegible] Malt Extract in the [illegible]
Johann Hoff's Malt Extract, is a [illegible]
of the value of a liquid [illegible]
and the presence of any [illegible]
that the less alcohol form, the [illegible]
assimilable substance; under such [illegible]
decided advantages over the preparations sold [illegible]
In the first these the former contains three [illegible]
latter has yielded in two samples. four and [illegible]

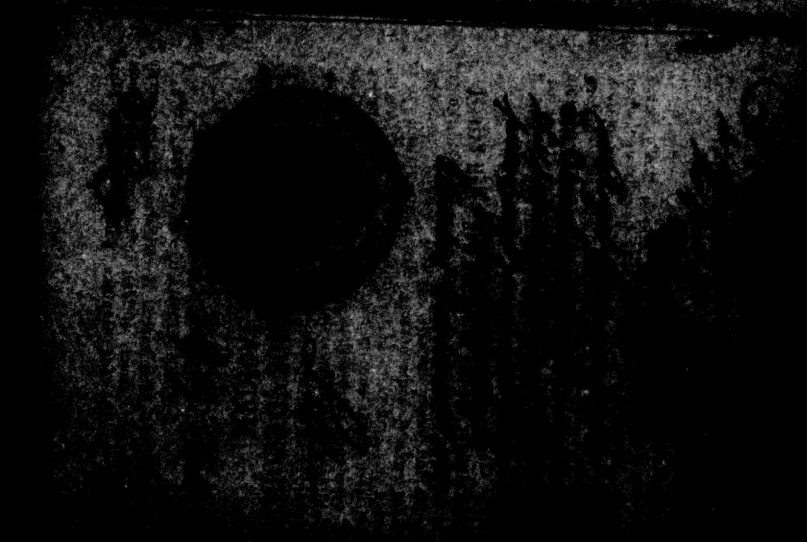
I have noted in a number of examinations of the [illegible]
presence of Salicylic Acid, while I have never [illegible]
Hoff's Extract found any traces of such [illegible]
extensively studied, and the unanimous [illegible]
advantageous as an addition to any form of [illegible]
Malt Extract. From some observations made [illegible]
the Polyclinic in May, 1895, it appears that not [illegible]
the action of diastase, to which malt owes its [illegible]
starch digesting power of the pancreatic [illegible]
the addition of this body is to render the [illegible]
system is concerned, but introduces into the [illegible]
nevertheless with an important function. [illegible]
given from time to time much attention to the [illegible]
have all so far as I am aware condemned [illegible]
For this reason, among others as above [illegible]
Johann Hoff's Malt Extract is to be preferred. [illegible]
made on samples obtained in the open market and [illegible]

Yours Henry Leffmann, M. D. Ph. D.
Woman's Med. Coll. and Penna. Coll. Dental Surgery.
Food Inspector Penna. Board of Agricult.

[illegible]se for the Use of Johann Hoff's Malt Extract.

[illegible] of anæmia, take a wineglassfull 3 times a day. In Convalescence
[illegible]neral debility, and loss of appetite, take one or two wineglassfull
[illegible]ay, shortly before meals or during meals.
[illegible]yspepsia, malnutrition and indigestion take one or two wineglass-
[illegible] shortly after every meal.
[illegible]almonary diseases, throat troubles, affections of the respiratory
[illegible]s and coughs dissolve two or more of the Malt Bonbons in the Extract
[illegible] a wineglassful hot at bed time and once during the day if possible.





Directions for the use of Johann Hoff's Malt Extract.

In cases of dyspepsia, stomach diseases, hæmorrhoids, anæmia and blood diseases, general debility, weakness and for mothers while nursing, take a wineglassful 1 to 4 times a day. In cases of respiratory affections, coughs, colds, sore throat and lung troubles, a wineglassful should be used occasionally, at bed-time and in the morning. Dose for children, one teaspoonful. Put and save food as to be retained as much as alcoholic drinks.

OPINIONS OF SOME MEMBERS OF THE MEDICAL FACULTY.

OFFICE OF ALBERT PENCK, M. D.,
No. 235 NORTH SIXTH ST.,
PHILADELPHIA, December 7th, 1885.

DEAR SIRS—After careful investigation of the merits of the different Extracts of Malt in the market, I have concluded to use the Genuine Johann Hoff's Malt

Yours very truly,

Messrs. Elsner & Engelhorn.

I have found Johann Hoff's Malt Extract [illegible] of great value in [illegible] and I have used it for years [illegible]

Doctor Mal[illegible]

German Hospital, [illegible]

To Moritz Elsner, Esq.

Sole Agent of Johann Hoff's Malt Extract

U. S. of A.

Dear Sir—Please send me [illegible] Malt Extract to the above address. [illegible] acquainted with it, and my patients [illegible]

Resident Physician of the German Hospital

and St. Vincent's Hospital

Agent for Johann Hoff's Malt Extract

320 Race St., Philadelphia.

Dear Sir—Dr. [illegible] Johann Hoff's Malt Extract as the best and only [illegible] purpose. With kind regards I am

Yours truly,

Chas. S. Turnbull, M. D.

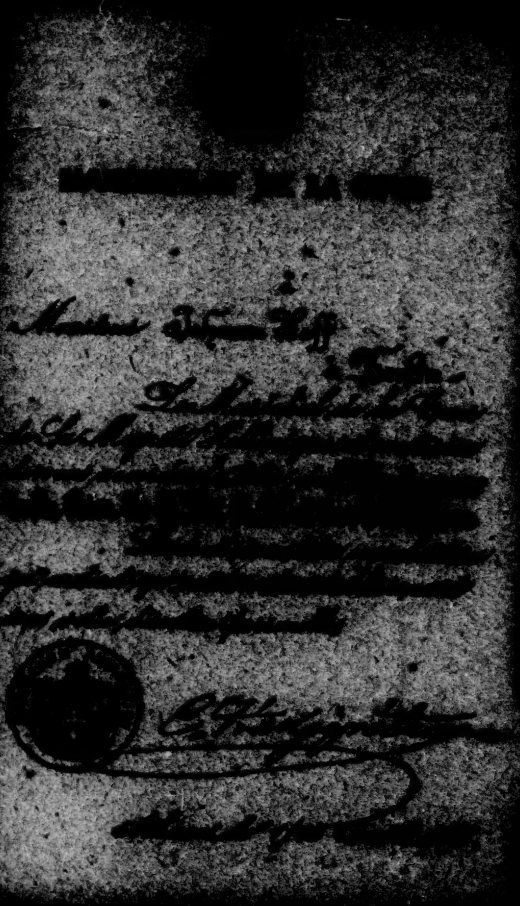
Asst Prof. Inf[illegible] Medical College, Phila.

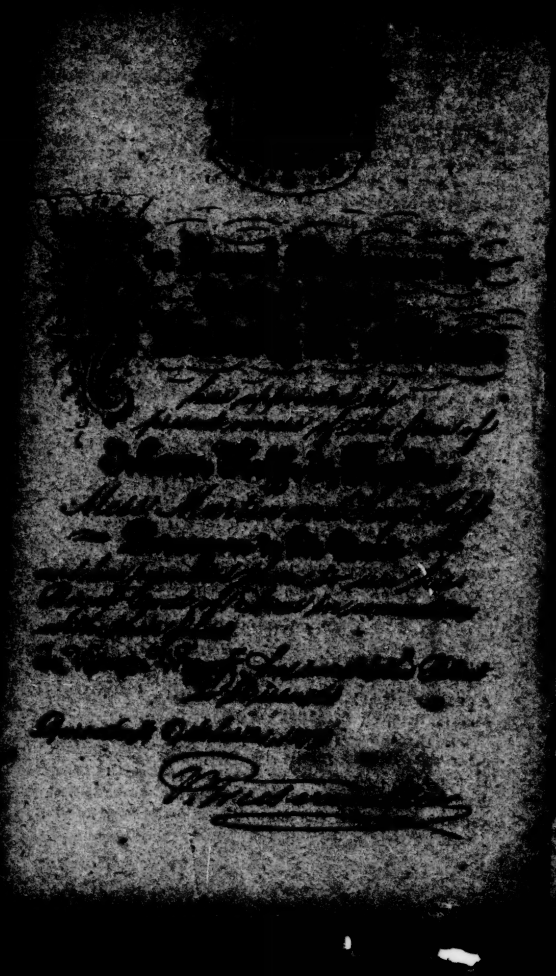
Mr. M. Elsner.

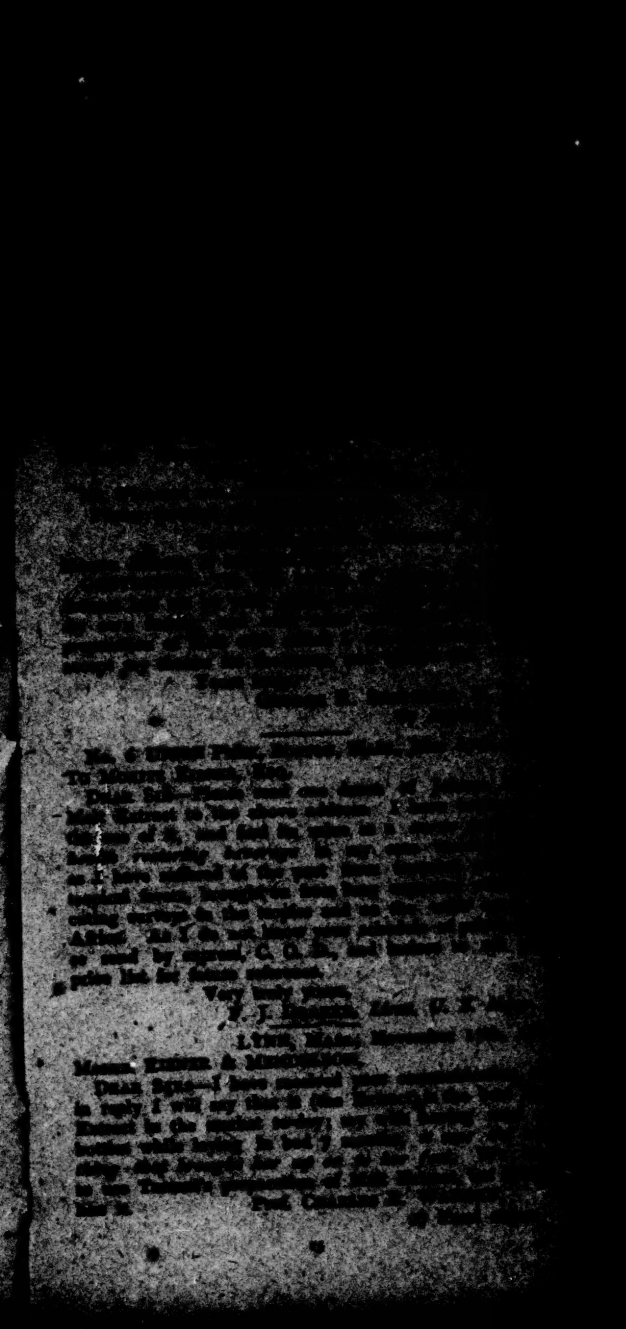
I have used the Johann Hoff's Malt Extract and [illegible] with very good effect.

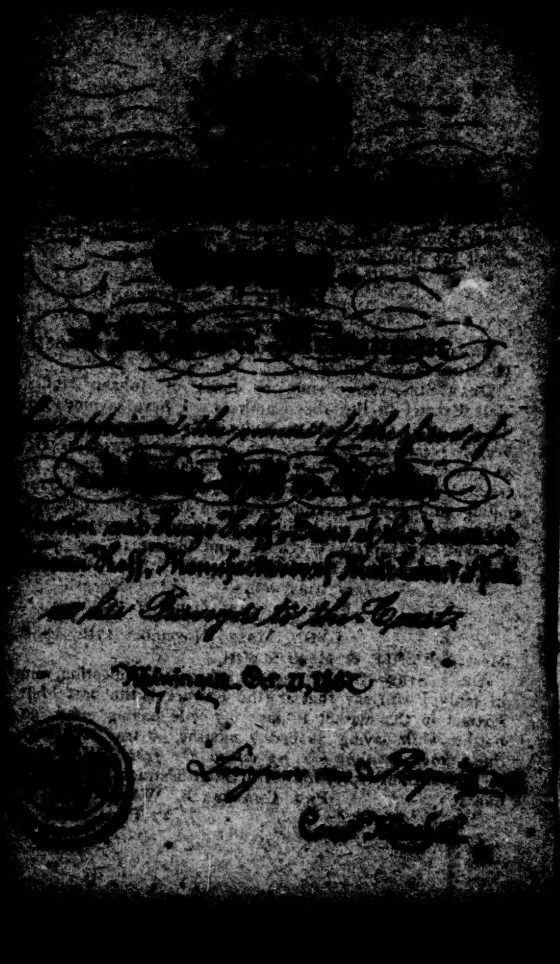
Wm. Pepper, M. D.

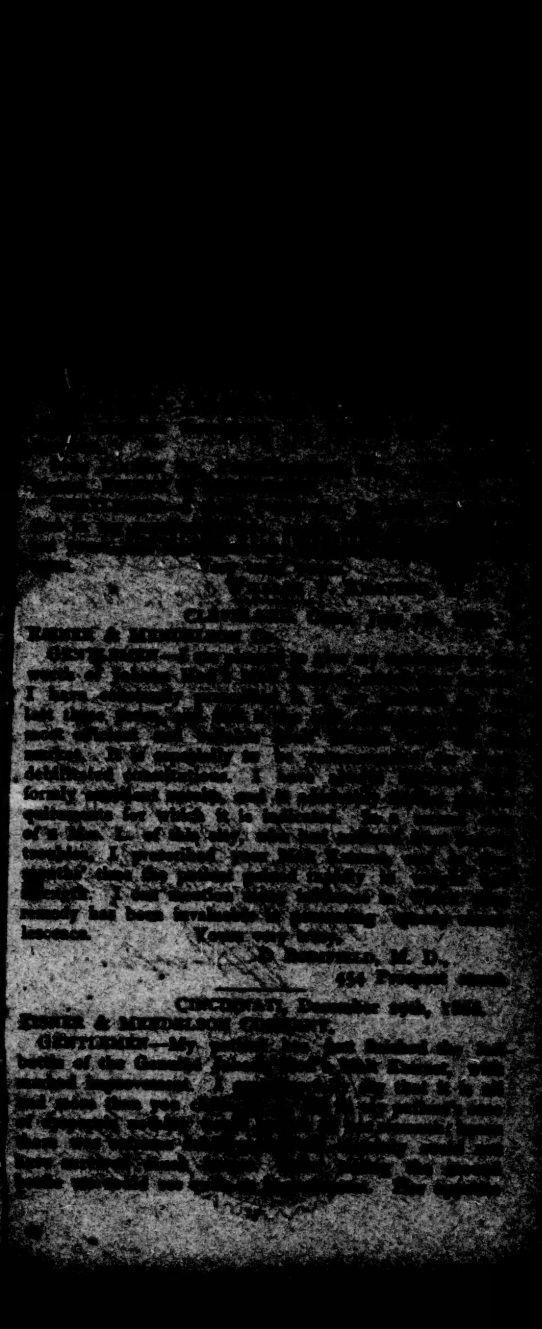
Provost of the University of Pennsylvania.

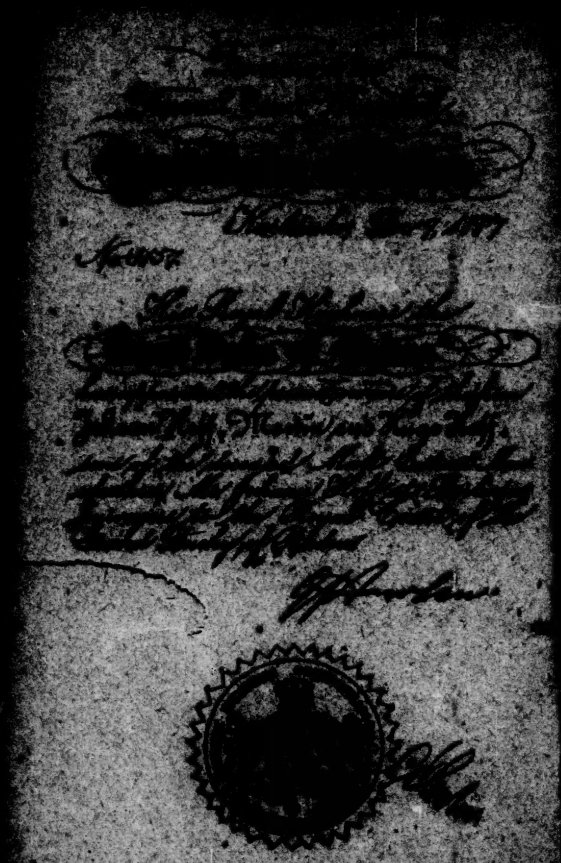












[illegible]

1849 Hanover St., Philadelphia, Dec. 6th, 1[illegible]

Messrs. Evans & Matlack:

I have used Johnson Holt's Malt Extract for the [illegible] five years in my private practice, and have found it to [illegible] the best Health Restoring Beverage and Tonic [illegible] known. I have found it especially good for [illegible] suffering from wear, in cases of dyspepsia, [illegible] nervousness and in cases of visible debility, and [illegible] condition. My attention was drawn by the [illegible] reputation unfavorably, and since I satisfied [illegible] supplied by you have proved my impressions in [illegible] unobjectionable for the past five years.

Yours respectfully,

W. W. Laird, M. D.,

Chief Drug Inspector U. S. Port of Philadelphia.

Philadelphia, [illegible]

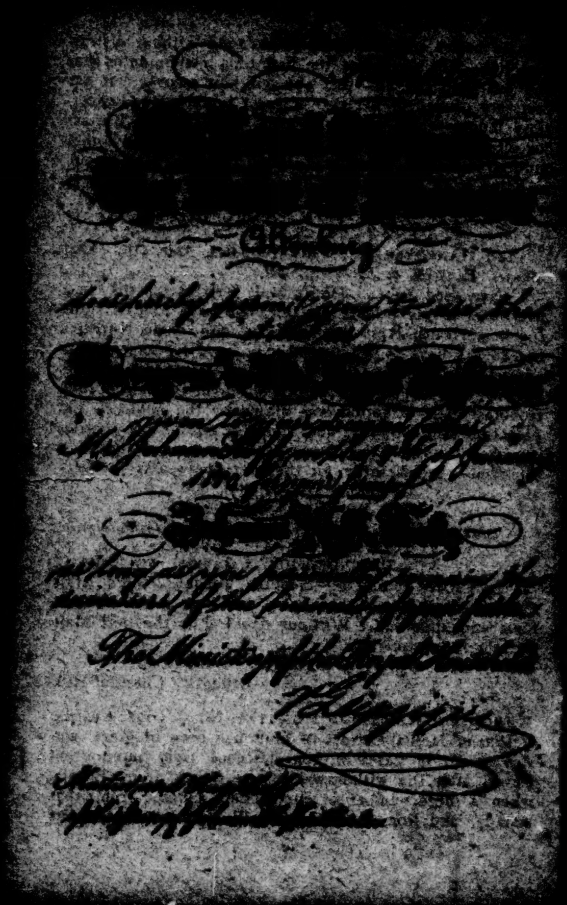
I have been taking the Genuine Johnson Holt's Malt Extract myself for a year or so, and find it an excellent tonic and appetizer. Without doubt it is the best Malt Extract in the market.

William A. Whitney,

Druggist, Chestnut [illegible]

From the Garretson Hospital, No. 7, Green [illegible]

Johnson Holt's Extract of Malt has been of great use [illegible] to [illegible] of convalescents from [illegible] diseases, especially [illegible] Whatever of the praise [illegible] which a large number of our patients received [illegible] remedy, and from [illegible]. We [illegible]



Malt Bouillon

A VERY PALATABLE AND NUTRITIOUS

with

Coughs, Colds and Sore Throat

Can also be used by Invalids to be the best Tonic (when brandy and wine is ordered by the Doctor). It will relieve all Indigestion, Dyspepsia and Sick Headache, Nervousness, Loss of Sleep, etc.

DOIT'S MALT BOUILLON AND

AND TO BE HAD FOR THE ASKING

FOR SALE BY

EISNER & MENDELSON COMPANY,

Sole Agents,

NEW YORK.

JOHANN HOFF'S
MALT EXTRACT

suspended by it. It thus appears the addition of this body is to render the extract not only inactive so far as its own function is concerned, but it introduces into the system an injurious substance, and one which interferes with an important function. Sanitary authorities, in various parts of Europe, have given from time to time much attention to the now indiscriminate use of this acid, and have all, so far as I am aware, condemned its employment in any article of food or drink. For this reason, among others as above noted, I am of the opinion that genuine Johann Hoff's malt extract, as imported by Eisner & Mendelson, is to be preferred. I may say that all the examinations were made on samples obtained in the open market, and in the bottles as originally imported.

Yours, HENRY LEFFMAN, *M. D.*,
Prof. Chem. Woman's Med. Col., and Penna. Col. Dental Surgery;
Food Inspector, Pennsylvania Board of Agriculture.

87 EXHIBIT "I," No. 935.

Translation of a paragraph from Hager's Pharmaceutical Practice, published at Berlin, 1880, vol. 1, page 1107.

"Malt extract—beer of health," of Johann Hoff, of Berlin (a remedy recommended against nearly all diseases), originated in 1861, is a sort of diluted beer like the Bavarian beer, containing a beer extract from boneset leaves, blessed thistle leaves, buckthorn bark, with a little sugar coloring, and flavored with coriander, cardamon, cinnamon, anis- potash.

88 EXHIBIT "K," No. 935.

Henry Leffmann, M. D., analytical chemist and expert, 715 Walnut street, Philadelphia.

OCT. 26, 1889.

Messrs. Eisner & Mendelsohn.

SIR-: In response to inquiries made concerning the relative merits of the Johann Hoff's malt extract and that sold under the name of Tarrant's Hoff's extract, I may state as follows:

That I have, during the past eighteen months, made a number of examinations of the principal forms of malt extract in the market, and have, among other matters, satisfied myself that the Johann Hoff's malt extract, as imported by you, is a genuine extract of malt.

The judgment of the value of a liquid preparation of malt will be largely based on the percentage of alcohol, and the presence of any preservative, especially salicylic acid. It may be justly said that the less alcohol found the better, provided its place is not taken by some more objectionable substance; under such consideration, the Johann Hoff's malt extract possesses decided advantages over the preparation sold under the name of Tarrant's Hoff's extract, in the fact that the former contains three and one-half per cent. of

suspended by it. It thus appears the addition of this body is to render the extract not only inactive so far as its own function is concerned, but it introduces into the system an injurious substance, and one which interferes with an important function. Sanitary authorities, in various parts of Europe, have given from time to time much attention to the now indiscriminate use of this acid, and have all, so far as I am aware, condemned its employment in any article of food or drink. For this reason, among others as above noted, I am of the opinion that genuine Johann Hoff's malt extract, as imported by Eisner & Mendelson, is to be preferred. I may say that all the examinations were made on samples obtained in the open market, and in the bottles as originally imported.

Yours, HENRY LEFFMAN, *M. D.*,
Prof. Chem. Woman's Med. Col., and Penna. Col. Dental Surgery;
Food Inspector, Pennsylvania Board of Agriculture.

87 EXHIBIT "I," No. 935.

Translation of a paragraph from Hager's Pharmaceutical Practice, published at Berlin, 1880, vol. 1, page 1107.

"Malt extract—beer of health," of Johann Hoff, of Berlin (a remedy recommended against nearly all diseases), originated in 1861, is a sort of diluted beer like the Bavarian beer, containing a beer extract from boneset leaves, blessed thistle leaves, buckthorn bark, with a little sugar coloring, and flavored with coriander, cardamon, cinnamon, anis- potash.

88 EXHIBIT "K," No. 935.

Henry Leffmann, M. D., analytical chemist and expert, 715 Walnut street, Philadelphia.

OCT. 26, 1889.

Messrs. Eisner & Mendelsohn.

SIR-: In response to inquiries made concerning the relative merits of the Johann Hoff's malt extract and that sold under the name of Tarrant's Hoff's extract, I may state as follows:

That I have, during the past eighteen months, made a number of examinations of the principal forms of malt extract in the market, and have, among other matters, satisfied myself that the Johann Hoff's malt extract, as imported by you, is a genuine extract of malt.

The judgment of the value of a liquid preparation of malt will be largely based on the percentage of alcohol, and the presence of any preservative, especially salicylic acid. It may be justly said that the less alcohol found the better, provided its place is not taken by some more objectionable substance; under such consideration, the Johann Hoff's malt extract possesses decided advantages over the preparation sold under the name of Tarrant's Hoff's extract, in the fact that the former contains three and one-half per cent. of

alcohol, while the latter has yielded, in two samples, four and three-quarters and five per cent. respectively.

Further, I have noted in a number of examinations of the latter article—Tarrant's extract—the presence of salicylic acid, while I have never, in repeated examinations of the Eisner & Mendelsohn Johann Hoff's extract, found any trace of such preservative. The effects of salicylic acid have been extensively studied, and the unanimous opinion of sanitary chemists is that it is very objectionable as an addition to any form of food or drink, and especially
89 objectionable in malt extract. From some observations made in my own laboratory, and published in the Polyclinic in May, 1888, it appears that not only does salicylic acid wholly suspend the action of diastase, to which malt owes its starch-converting power, but that the starch-digesting power of the pancreatic secretion is wholly suspended by it. It thus appears, the addition of this body is to render the extract not only inactive so far as its own function is concerned, but it introduces into the system an injurious substance, and one which interferes with an important function. Sanitary authorities in various parts of Europe have given, from time to time, much attention to the now indiscriminate use of this acid, and have all, so far as I am aware, condemned its employment in any article of food or drink. For this reason, among others as above noted, I am of the opinion that the genuine Johann Hoff's malt extract, as imported by Eisner & Mendelsohn, is to be preferred. I may say that all the examinations were made on samples obtained in the open market and in the bottles as originally imported.

Yours,

HENRY LEFFMANN, M. D., PH. D.,
Prof. Chem. Woman's Med. Coll. and Penna. Coll. Dental Surgery, Food Inspector Penna. Board of Agricult.

90 United States Circuit Court, Southern District of New York.

In Re EISNER & MENDELSOHN COMPANY.

Appeal by the importer from a decision of the United States board of general appraisers affirming a decision of the collector of the port of New York.

Dudley, Michenor & Ray, for the importer.
Thomas Greenwood, ass't U. S. attorney, for the collector.

COXE, *J.*:

The appraisers found that the merchandise imported was a fluid malt extract, dutiable at 40 cents par gallon, under paragraph 338 of the tariff of 1890, which is as follows:

"Malt extract, fluid, * * * in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem."

It is said that this is the first time the term "malt extract" ever appeared in a tariff act.

The importer insists that it should have been classified under paragraph 75, which reads as follows:

"All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, twenty-five per centum ad valorem."

91 In approaching the question whether or not the importation is a fluid malt extract, care should be taken to guard against the impression, unfavorable to the appellant's contention, which is produced by the undisputed fact that the merchandise is imported as Johann Hoff's malt extract, and that it is advertised, sold, labeled and even described in the protest by that name. If calling it malt extract makes it malt extract, the appellant has no standing in court. But the question is, What is it? not what is it called? Keeping this distinction in mind, the evidence in this court seems to establish the proposition that it is not the malt extract of commerce and not the article which the law-makers must have had in mind, when paragraph 338 was enacted.

The Johann Hoff malt extract is a compound of many ingredients made by a secret formula, consisting of herbs, roots, leaves, dextrine, water, hop extract and malt extract; but there is only 12 per cent. of the latter. It might, with equal propriety, be called a hop extract, or by any one of its numerous ingredients. If this course had been adopted, and the compound had been known, for instance, as "Hoff's herb extract," it will hardly be contended that the presence of 12 per cent. of malt would make it dutiable under paragraph 338.

Although some matters might, perhaps have been made clearer by the proof, the court is satisfied that the merchandise in question was never known as a malt extract commercially, in the sense in which that word must be used as applicable to the tariff law. Of course, this particular compound has long been known to the trade and commerce of this country, but it is thought that importers and large dealers would not understand the term "malt extract" to include Hoff's extract, and would not fill an order for malt extract by sending the Hoff compound. The very fact that its composition is unknown, would prevent such a classification.

92 That it is a medicinal proprietary preparation is not disputed, and it is not argued for the collector that it contains alcohol. It is thought, therefore, that paragraph 75 specifically describes it, and that the collector should have classified it under that paragraph.

It is not often that an authority is found which is an exact precedent for the case in hand. There are always some distinguishing facts, but the case of Ferguson *vs.* Arthur, 117 U. S., 172, approaches much nearer than is usual to the facts of the present case. In principle the two cases are identical.

"Henry's calcined magnesia" was held to be dutiable as a "proprietary medicine," although another paragraph assessed duty upon "magnesia, calcined, twelve cents per pound." Indeed, it would seem that the merchandise in the Ferguson case was much nearer

to "magnesia, calcined," than the merchandise here is to "malt extract, fluid." It was, in fact, calcined magnesia, but prepared by a secret formula which gave it peculiar advantages. Here the merchandise in question is not in a proper sense "malt extract" at all.

It will be seen by the following comparison that every argument applicable to "Henry's calcined magnesia," applies with equal or greater force to "Hoff's malt extract."

Henry's Calcined Magnesia.	*Hoff's Malt Extract.*
"It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market."	It has been prepared by the same family, a firm of manufacturing chemists in Berlin, Germany, for the last twenty-five years and over, and has a peculiar value in the market.
93 "That the article in question is a medicinal preparation there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a 'medicine.'"	That the Hoff extract is a medicinal preparation there can be no doubt. The circulars and labels set forth its virtues as a remedy in disease, calls it a "medicine," and recommend that it should be taken under the advice of a physician.
"It has a character of its own, distinct from the ordinary calcined magnesia, which must arise from the special mode of manufacture."	It has a character of its own, distinct from the ordinary malt extract, which arises from the special mode of manufacture, and from the fact that only twelve per cent. of malt is used.
"Henry's article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia calcined."	Hoff's article is not the ordinary malt extract dutiable by the gallon, but something is done to the small percentage of malt extract found there, together with the other ingredients by Hoff, which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine. The base of it is not shown to be malt extract.

The court does not lose sight of the distinctions pointed out by the counsel for the collector, based upon the changed language of the tariff, since the decision of the Ferguson case, but it
94 seems to the court, in view of the principle there enunciated and of the conceded facts, that the article in question contains but twelve per cent. of malt extract, and is a proprietary medicine put up by a secret formula; that it is more appropriately assessed under paragraph 75 than under paragraph 338.

Immutability of the law is a wise maxim of political economy, which is too often lost sight of by the legislative power, both State and national. Frequent alteration, whether by the legislature, or by those who interpret the law in the first instance, unsettles business and retards prosperity. By adopting a reasonable uniformity of construction the courts, as far as possible, should see to it that commerce is not vexed by unnecessary changes. For fifteen years the merchandise in question has entered our ports as a proprietary medicine. No reason exists for a change now.

The decision of the board is reversed.

(Endorsed:) No. 935. United States cir. court, southern district of New York, *In re* Eisner and Mendelsohn Co. Decision, Coxe, J. U. S. circuit court. Filed Mar. 14, 1893. John A. Shields, clerk.

95 At a stated term of the circuit court of the United States of America, for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the 20th day of March, in the year of Lord one thousand eight hundred and ninety-three.

Present: The Hon. Alfred C. Coxe, circuit judge.

In the Matter of The Application of the EISNER & MENDELSOHN Co. as to Certain Importations per "Thingvalla," Sept. 5, 1891, and "Island," Oct. 6, 1891.	No. 935.

The above cause coming on for hearing and determination before this court, on the application of the Eisner & Mendelsohn Co., the above-named importers, for a review of the questions of law and fact involved in the decisions of the board of United States general appraisers herein, and on the return of the board of general appraisers of the record, with a certified statement of the facts found by them, and their decisions thereon, and on the further evidence taken in this court before U. S. General Appraiser George H. Sharpe.

Now, after hearing Dudley, Michenor & Ray, on behalf of the Eisner & Mendelsohn Co., and Thomas Greenwood, Asst. U. S. attorney, in opposition thereto, and due consideration having been had—

96 It is ordered, adjudged and decreed, that the decision of the collector of the port herein, that the merchandise imported by the vessels and at the dates above mentioned, was dutiable at a rate of forty cents per gallon, as malt extract fluid, in bottles, under paragraph 338, of the tariff act of October 1, 1890, and the affirmance thereof by the board of general appraisers herein be, and the same hereby is, reversed; and—

It is further ordered, adjudged and decreed, that Johann Hoff's malt extract be, and the same is classified under section 75, Schedule "A," of the act "to reduce the revenue and equalize duties on imports, and for other purposes," of October 1, 1890, as a medicinal proprietary preparation, of which alcohol is not a component part, and which is not specifically provided for in the act; and that the rate of duty imposed thereon under such classification, is hereby fixed at twenty-five per centum ad valorem.

ALFRED C. COXE, *U. S. J.*

(Endorsed:) No. 935. U. S circuit court, southern district of New York. In the matter of the application of Eisner & Mendelsohn Co. as to certain importations per "Thingvalla," Sept. 5, 1891; per "Island," Oct. 6, 1891. Judgment of reversal. Dudley, Michenor & Ray, No. 40 Wall str., N. Y., attorneys for petitioners. U. S. circuit court. Filed Mar. 21, 1893. John A. Shields, clerk.

97 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, Appellant,
against
EISNER AND MENDELSOHN CO., Appellee. } No. 935.

Assignment of Errors.

The United States of America hereby assigns error to the decision and the decree of the circuit court of the United States, for the southern district of New York, in the above-entitled case, in the following particulars:

First. In that the said court ordered, adjudged and decreed, a reversal of the decision of the board of U. S. general appraisers; that the merchandise in suit (Johann Hoff's malt extract) was, as decided by the collector of customs, dutiable at the rate of forty (40) cents per gallon as malt extract, fluid, in bottles, under the provisions for "Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem," contained in paragraph 338 (schedule H), of the tariff act of October 1, 1890 (26 U. S. Stat., 590).

Second. In that the said court ordered, adjudged and decreed, that the said merchandise should be classified for duty at the rate of 25% ad valorem, as a medicinal proprietary preparation, of
98 which alcohol is not a component part and not specially provided for in this act, under paragraph 75 (schedule A), of the said tariff act of October 1, 1890.

Third. In that the said court did not order, adjudge and decree. that the said merchandise was, as decided by the collector of customs, dutiable at the rate of forty (40) cents per gallon as malt extract, fluid, in bottles, under the aforesaid provision for malt extracts.

Dated, New York, April 6th, 1893.

EDWARD MITCHELL,
U. S. Attorney, in behalf of the United States.
Room 50, post-office building, New York city, N. Y.

(Endorsed:) "A," suit No. 935. U. S. circuit court of appeals for the second circuit. The United States, appellant, *vs.* Eisner & Mendelsohn Co., appellee. Assignment of errors. Edward Mitchell, United States attorney, attorney for collector. Due service of a copy of the within is hereby admitted. Dated, New York, April 7, 1893. Dudley, Michenor & Ray, attorneys for appellee. To Dudley, Michenor & Ray, Esqs., attorneys for importer, 40 Wall St., New York city, N. Y. U. S. circuit court. Filed Apr. 7, 1893. John A. Shields, clerk.

99 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, Appellant,
against
EISNER AND MENDELSOHN CO., Appellee. } Suit No. 935.

Please take notice, that the undersigned, on behalf of the collector of the port of New York, and on the part of the United States, hereby appeals from the decision of this court, rendered herein and entered on the 21st day of March, 1893, to the United States circuit court of appeals for the second circuit.

Dated, New York, April 6th, 1893.

Yours, &c.,
EDWARD MITCHELL,
U. S. District Attorney for the Southern District of N. Y.,
Room 59 Post-office Building, New York City.

To Dudley, Michenor & Ray, Esqs., attorneys for importer.

(Endorsed:) Suit No. 935. U. S. circuit court, southern district of New York. The United States of America, appellant, ag'st Eisner and Mendelsohn Company, appellee. Notice of appeal. Edward Mitchell, U. S. attorney. Due service of a copy of the within notice of appeal is hereby admitted. Dated, April 7, 1893. Dudley, Michenor & Ray, attorneys for appellee. U. S. circuit court. Filed Apr. 7, 1893. John A. Shields, clerk.

100 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, Appellant,
against
EISNER AND MENDELSOHN CO., Appellee. } Suit No. 935.

To the United States circuit court of appeals for the second circuit:

The Attorney General of the United States hereby applies for the allowance of an appeal to the United States circuit court of appeals for the second circuit, from the decision and judgment of the U. S. circuit court, rendered herein on the 21st day of March, 1893.

Dated, Apr. 6th, 1893.

RICHARD OLNEY,
Attorney General,
Per EDWARD MITCHELL,
U. S. Attorney.

The foregoing application is granted and appeal allowed.

Dated, New York, April 6th, 1893.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

101 (Endorsed:) Suit No. 935. U. S. circuit court of appeals for the second circuit. The United States of America, appellant, against, Eisner & Mendelsohn Company, appellee. Applica-

tion for and allowance of appeal. Edward Mitchell, U. S. attorney. Due service of a copy of the within is hereby admitted. Dated April 7th, 1893. Dudley, Michenor & Ray, attorneys for appellee. U. S. circuit court. Filed Apr. 7, 1893. John A. Shields, clerk.

UNITED STATES OF AMERICA, *ss:*

To Eisner & Mendelsohn Company, importer:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, at the city of New York, on the 5th day of May, 1893, pursuant to an appeal on the part of the United States, filed in the clerk's office of the circuit court of the United States, for the southern district of New York, in a certain suit or proceeding, entitled, "The United States of America, appellant, against Eisner & Mendelsohn Company, appellee," to show cause, if any there be, why the decision of the U. S. circuit court, in the said appeal mentioned, should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under my hand at the city of New York, in the southern district of New York, on the 6th day of April, 1893.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

EDWARD MITCHELL,
U. S. District Attorney, on Behalf of the United States, Appellant.

102 (Endorsed:) Suit No. 935. U. S. circuit court of appeals for the second circuit. The United States of America, appellant, against Eisner & Mendelsohn Company, appellee. Citation. Edward Mitchell, U. S. attorney. Due service of a copy of the within citation is hereby admitted. Dated April 7, 1893. Dudley, Michenor & Ray, attorneys for appellee. U. S. circuit court. Filed Apr. 7, 1893. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the foregoing pages, numbered from one to 125 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the United States of America, appellant, against Eisner & Mendelsohn Company, appellee, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern [SEAL.] district of New York, in the second circuit, this 4th day of May, in the year of our Lord one thousand eight hundred

and ninety-three, and of the Independence of the said United States the one hundred and seventeenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: United States circuit court of appeals, second circuit. Filed Jun- 26, 1893. John A. Shields, clerk.

103 United States Circuit Court of Appeals, Second Circuit.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSON Co.

This is an appeal from a decision of the circuit court for the southern district of New York, reversing a decision of the board of general appraisers which affirmed the collector's classification for duty of certain fluid malt extract. The merchandise is Johann Hoff's malt extract imported in bottles.

LACOMBE,
Circuit Judge.

The tariff act of Oct. 1st, 1890, contains the following:

Par. 75. "All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, 25% ad valorem."

Par. 338. "Malt extract fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem."

There are other provisions covering bottles generally imported full, which need not be considered, as the importer's protest did not set forth the paragraph under which they now claim the bottles should be classed.

104 The collector assessed duty under paragraph 338; the importers claim that the merchandise should be classified under paragraph 75.

Johann Hoff's malt extract is a compound of several ingredients, prepared according to a secret formula; it is a medicinal proprietary preparation; it contains a little alcohol, which, however, has not been added as a component, but is generated in the mixture itself. The malt extract in the compound bears to the other ingredients the proportion of 12 to 88, but it is advertised, labelled, and described by the makers and their agents as a malt extract; is imported as such, and has been at all times bought and sold as a malt extract in the trade and commerce of this country. Other proprietary preparations containing malt extract are similarly advertised, labelled, described, bought and sold, each with the name of the particular proprietor prefixed to the word- "malt extract." The trade nomenclature of these articles has an important bearing upon the interpretation to be given to the 338th paragraph above cited. "In fixing the classification of goods for the payment of duties the name or designation of the goods is to be understood in its

known commercial sense; their denomination in the market will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied." American Net and Twine Co., P. Worthington, 141 U. S., 471.

Besides the malt extract, which *are* thus prepared according to secret formulæ, there are others which are made according to the public and well-known formula of Baron Liebig, given in the United States and German pharma*posias*.

105 These vary in consistency from a dry powder to a semi-fluid, being imported and bought variously in barrels, bottles, jugs, by the pound or by the gallon. This — sometimes designated in the trade "malt extract," sometimes "Liebig's malt extract," and sometimes "malt extract," with the maker's name prefixed, as "Loeflund's malt extract," "Lehn & Fink's extract of malt" (the terms malt extract and extract of malt are interchangeable in the trade). Proprietary as well as non-proprietary malt extracts are made in this country—Trommer's extract of malt at Fremont, Ohio, and others elsewhere.

Prior to 1890 none of these malt extracts were described *eo nomine* in the tariff acts. As far back as 1875 (Synopsis Treasury Decisions, No. 2388) malt extract was classified for duty as beer. In 1876 (*Id.*, 2867) Johann Hoff's malt extract imported in bottles was held by the Treasury Department not to be covered by the ruling of 1875, but to be dutiable as a proprietary medicine. In 1881 (*Id.*, 4834) the same article was classified as a proprietary medicine, even when imported in casks. In 1885 (*Id.*, 6917) Loeflund's malt extract was similarly classified, and in Aug., 1890 (*Id.*, 10157), another extract of malt, whose name does not appear, was classified as food product and held dutiable as a non-enumerated manufactured article.

In view of the fact that there were known to trace so many different varieties of malt extract, bought and sold as such, some with the maker's or proprietor's name and some without, some dry, some condensed, some semi-fluid or semi-solid (thicker than ordinary molasses, as one of the witnesses describes it), and some fluid, and of the further facts that different rates of duty had been

106 from time to time assessed upon it under Treasury rulings, and that both proprietary and non-proprietary malt extracts are manufactured in this country, it seems reasonable to infer that when Congress imposed a duty upon malt extract, if fluid and in casks, at 20 cents a gallon; if fluid and in bottles or jugs, at 40 cents a gallon, and if solid or condensed, at 40 per cent. ad valorem, it intended to cover all the known kinds of malt extract in all the known conditions in which it is imported. Certainly the language used in the tariff act, construed according to the ordinary rules of interpretation, supports such conclusion. The duty paid on medicinal proprietary preparations is exclusive of such as are elsewhere in the act specially provided for; and although Johann Hoff's malt extract be a medicinal proprietary preparation it is specially provided for by the term malt extract, since it is as a malt extract that it is described, labelled, advertised, bought, and sold.

In our opinion this case is not controlled by the decision of the Supreme Court in Ferguson *v.* Arthur, 117 U. S., 482. In that case the general provision as to calcined magnesia was, as the court held, by its terms applicable only to the single kind of magnesia that was sold in bulk by the pound, whereas the provisions of paragraph 338 of the act now under consideration are manifestly enlarged so as to cover malt extract in all conditions of consistency, and whether in bulk or in such smaller packages as as are frequently characteristic of proprietary preparation. Moreover, in the Ferguson case the paragraph touching proprietary preparations did not in terms exclude such preparations as were elsewhere specifically provided for.

107 The decision of the circuit court is reversed and the classification of the board of general appraisers affirmed.

(Endorsed:) Circuit court of appeals. The United States *vs.* Eisner & Mendelson Co. Opinion. United States circuit court of appeals, second circuit. Filed Jan. 12, 1894. John A. Shields, clerk.

108 United States Court of Appeals, Second Circuit.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSOHN COMPANY.

Petition of Appellee for Rehearing.

Comes now the appellee, the Eisner & Mendelsohn Co., and petitions that the court will grant a rehearing of the argument in this case on the following grounds:

1. The evidence in the record is that Johann Hoff's malt extract is not known commercially or to the trade as a malt extract.

2. Johann Hoff's malt extract is easily separable from the article known to commerce as "malt extract," as is shown by the evidence. Its composition is found by the court in this case to contain all malt extract but the preparation of 12 to 88, and, as the evidence shows, it is described in "Hager's Pharmaceutical Practice," published in Berlin in 1880 (vol. 1, p. 1107), as—

"'Malt extract, beer of health,' of Johann Hoff, of Berlin (a remedy recommended against nearly all diseases), originated in 1861; is a sort of beer extract of boneset leaves, blessed thistle leaves, buckthorn bark, with a little sugar coloring, and flavored with coriander, cardamon, cinnamon, anis-, potash." (Record, p. 87, F. 260.)

3. It is clear, as stated in the opinion of the court, that Johann Hoff's malt extract is a "medicinal proprietary preparation."

109 It therefore comes within the language of par. 75 of the tariff act of October 1st, 1890.

4. It appears from the evidence that Johann Hoff's malt extract has not been imported, advertised, bought or sold as a malt extract, but only as "the genuine Johann Hoff's malt extract." It is always advertised as a "medicinal proprietary preparation."

5. It is advertised and sold as "of peculiar excellence," on account of its special virtues from the care and material used in its manufacture.

6. It is proved that there is imported an article known to commerce as "malt extract," to which par. 338, fixing the duty on malt extract, does apply.

If the duty on the bottles is to be affirmed, it would seem proper that it would be done on the ground that the contents of the bottles are subject to a specific duty, and as the appellee contended to an ad valorem duty, in which case it is claimed that the contents of the bottles would not be subject to any other duty. Of course, the petitioner claiming that Johann Hoff's malt extract was subject only to an ad valorem duty of 25 % would not refer to any section of the statute imposing a duty upon bottles filled with an article subject to specific duty.

7. The affidavit of Moritz Eisner, secretary of the Eisner & Mendelsohn Co., filed herein, shows that the amount involved in the present case, and in other cases, pending before the United States commissioners awaiting the decision of this case, for every action exceeds the sum of ten thousand dollars ($10,000), and therefore a rehearing of the argument and for the consideration of the question should be permitted, that the question involved in the case may properly be submitted in the Supreme Court of the United States for its advice thereon.

110 For the reasons above given the petitioner respectfully asks that a reargument of the question of classification may be permitted.

CHARLES A. RAY,
For Appellee, 40 *Wall St., New York, N. Y.*

(Endorsed:) "A." Suit, No. 935. U.S. circuit court of appeals for the second circuit. The United States, appellant, *vs.* Eisner & Mendelsohn Co., appellee. Petition & motion for reargument by appellee. Charles A. Ray, for appellee, 40 Wall St., New York city. United States circuit court of appeals, second circuit. Filed Jan. 31, 1894. John A. Shields, clerk.

111 United States Court of Appeals for the Second Circuit.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSOHN CO., Appellee. } No. 935.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, Moritz Eisner, secretary of the Eisner & Mendelsohn Co., being duly sworn, on my oath say that in the various protests still pending before the board of United States general appraisers in the matter of the protests of the Eisner & Mendelsohn Co. against the classification made by the collector of customs upon the importations of the Eisner & Mendelsohn Co. of Johann Hoff's malt extract, and involving the same question presented in this pending appeal,

together with the sum involved in the appeal pending in this court from the judgment of the United States circuit court for the southern district of New York, in which the United States are appellants and The Eisner & Mendelsohn — appellees, and which is numbered on the docket in this court No. 935, the sum exceeds in amount ten thousand dollars ($10,000), which the appellee claims should be refunded to it as having been paid in excess of the amount which should have been due under a proper classification of Johann Hoff's malt extract.

112 MORITZ EISNER.

Sworn to before me this 26th day of January, 1894.

JOHN A. SHIELDS,
U. S. Commissioner.

(Endorsed:) "A." Suit No. 935. U. S. circuit court of appeals for second circuit. The United States, appellant, *vs.* Eisner & Mendelsohn Co., appellee. Affidavit of Moritz Eisner that amount involved in final decision of question pending exceeds $10,000. Charles A. Ray, for appellee. United States circuit court of appeals, second circuit. Filed Jan. 31, 1894. John A. Shields, clerk.

113 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSON COMPANY, Appellee, } (No. 935.)

SIR: Please take notice that an application will be made by the undersigned to the United States circuit court of appeals for the second circuit, at its court-rooms, in the post-office building, in the city of New York, on the 29th day of January, 1894, at 10.30 o'clock a. m. on that day or as soon thereafter as counsel can be heard, for an order, of which the annexed is a copy, and for such other and further relief as the court shall deem meet and just.

Dated New York, Jan. 13, 1894.

Yours, etc.,
EDWARD MITCHELL,
U. S. Attorney, S. D. N. Y., Counsel for Appellant.

To Charles A. Ray, Esq., counsel for appellee, 40 Wall street, New York city, New York.

114 At a stated term of the United States circuit court of appeals for the second circuit held at the United States court rooms, in the city of New York, on the 29th day of January, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorables Wm. J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

THE UNITED STATES, Appellants,
vs.
EISNER & MENDELSON COMPANY, Appellee. } (No. 935).

The appeal from a decision of the circuit court of the United States for the southern district of New York made herein March 21st, 1893, having come on to be heard and due deliberation having been had, now, on motion of Edward Mitchell, U. S. attorney, of counsel for the United States, appellant, it is ordered, adjudged, and decreed—

1. That the said decision of the said circuit court be, and the same hereby is, in all things reversed.

2. That the decision of the board of U. S. general appraisers affirming the classification for duty by the collector of customs
115 of the merchandise in suit, viz., Johann Hoff's malt extract, at the rate of forty cents per gallon as malt extract, fluid, in bottles, under the provision for such malt extract contained in paragraph 338, Schedule H, of the tariff act of October 1st, 1890 (26 U. S. Stat., 590), and of the bottles containing said merchandise at the rate of one and one-half cents per pound under the provisions of paragraph 103, Schedule D, of the same tariff act (26 U. S. Stat., 571) be, and the same hereby is, in all things affirmed, and

3. That a mandate of this court issue to said circuit court directing that court to proceed accordingly.

W. J. W.
E. H. L.
N. S.

(Endorsed:) "A." Suit No. 935. U. S. circuit court of appeals. The United States, appellant, *vs.* Eisner — Mendelsohn Co., appellee. Notice of motion and for mandate. Henry C. Platt, United States attorney, of counsel for appellant. Due service of a copy of the within is hereby admitted. Dated New York, Jan'y 13, 1894. Charles A. Ray, counsel for appellee. To Charles A. Ray, Esq., of counsel for appellee, 40 Wall St., New York city, N. Y. United States circuit court of appeals, second circuit. Filed Feb. 5, 1894. John A. Shields, clerk.

116 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court-rooms in the city of New York on the 5th day of February, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorables William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSOHN COMPANY, Appellee. } Suit No. 935. 1893. Calendar No. 57. Docket No. 246.

A motion for reargument of the appeal taken in the above-entitled cause coming on to be heard, now, after hearing Charles A. Ray,

Esq., of counsel for appellee, in behalf of said motion, and Thomas Greenwood, Esq., asst. U. S. attorney, of counsel for appellant, in opposition thereto, it is ordered that said motion be, and the same hereby is, denied.

N. S.
E. H. L.

(Endorsed:) "A." Suit No. 935. U. S. circuit court of appeals for the second circuit. The United States *vs.* Eisner & Mendelsohn Co. Order denying motion for reargument. Henry C. Platt, United States attorney, attorney for collector. United States circuit court of appeals, second circuit. Filed Feb. 6, 1894. John A. Shields, clerk.

117 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to 116, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States, appellee, against Eisner & Mendelsohn Company, appellee, No. 935, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 15th day of February, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and eighteen.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: No. 15,517. Office Supreme Court U. S. Filed Feb. 26, 1894. James H. McKenney, clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1133.

UNITED STATES, APPELLANT,

vs.

EISNER & MENDELSON COMPANY, APPELLEE.

Petition for a Writ of Certiorari to be directed to the Circuit Court of Appeals for the Second Circuit.

FILED FEBRUARY 26th, 1894.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1133.

UNITED STATES, APPELLANT,

vs.

EISNER & MENDELSON COMPANY, APPELLEE.

PETITION

For writ of *certiorari* requiring the circuit court of appeals for the second circuit to certify to the Supreme Court, for its review and determination, the case of The United States, appellant, *vs.* Eisner & Mendelson Company, appellee.

To the Honorable the Supreme Court of the United States.

GENTLEMEN: The petition of Eisner & Mendelson Company respectfully shows to this honorable Court as follows:

First. Your petitioner is a domestic corporation, duly and lawfully organized, and is now, and for several years past has been, engaged in the importation of merchandise into the United States of America, and has been especially engaged in the business of importing therein Johann Hoff's

malt extract, transacting its business in the city of New York and elsewhere.

Second. Your petitioner, on the 5th day of September, 1891, by the steamship "Thingvalla," imported two thousand one hundred and thirty-one (2,131) gallons of Johann Hoff's malt extract in thirteen-ounce bottles, and on the 6th day of October, 1891, imported five thousand (5,000) gallons of Johann Hoff's malt extract in thirteen-ounce bottles.

Third. That the Johann Hoff's malt extract so imported by your petitioner was and is a compound of many ingredients, made by a secret formula, consisting of herbs, roots, leaves, dextrine, water, hop extract, and twelve per cent. of malt extract, and other ingredients; that it was and is a medicinal proprietary preparation, of which alcohol is not a component part; that it has been manufactured and sold by Johann Hoff and his sons, in the city of Berlin, Germany, for more than twenty-five years; that it is not known to the trade as a malt extract, and that it is easily separable from the article known to commerce as "malt extract."

Fourth. And your petitioner shows that the said Johann Hoff's malt extract so imported should have been by the collector of customs of the port of New York classified, rated, and charged, under the 75th paragragh of the act entitled "An act to reduce the revenue and equalize duties on imports, and for such other purposes," approved October 1st, 1890, and commonly known as the "tariff act of 1890," and which paragraph is as follows:

"All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, twenty-five per centum ad valorem." * * *

But the collector aforesaid classified, rated, and charged the said importations with a duty at the rate of forty cents per gallon, amounting in all to two thousand eight hundred and fifty-two dollars and forty cents ($2,852.40), erroneously

applying to such importations paragraph 338 of the tariff act aforesaid, which is as follows:

"Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per cent. ad valorem."

The said importations should have been classified, rated, and charged as a medicinal proprietary preparation, of which alcohol is not a component part, as before stated, not being specifically provided for in the act, and the actual dutiable value of such importations being forty-nine and three-fourth cents per gallon.

Fifth. And your petitioner shows that the total amount of such importations on the "Thingvalla" was one thousand and sixty dollars ($1,060.00), and the duty properly chargeable thereon under said paragraph, at twenty-five per centum ad valorem, was two hundred and sixty-five dollars ($265.00), and the amount thereof subject to duty on the "Island" was two thousand four hundred and eighty-eight dollars ($2,488.00), and the duty properly chargeable thereon under the paragraph aforesaid was six hundred and twenty-two dollars ($622.00); but the amount of duty exacted from your petitioner by the collector aforesaid was eight hundred and fifty-two dollars and forty cents ($852.40) on the consignment of the "Thingvalla," and two thousand dollars ($2,000.00) on the consignment of the "Island," making a total on the two consignments of two thousand eight hundred and fifty-two dollars and forty cents ($2,852.40), which was an excess of duties exacted from your petitioner of one thousand nine hundred and sixty-five dollars and forty cents ($1,965.40) on both consignments.

Sixth. Your petitioner shows that within ten days after the ascertainment, liquidation, and determination of the duties on the said importations respectively it gave notice in writing to the collector aforesaid, in compliance with the requirements of the act entitled "An act to simplify the laws

in relation to the collection of the revenues," approved June 10, 1890, setting forth therein distinctly and specifically, and in respect to each entry and payment, the reason for its objections thereto, but paying the full amount of duties and charges so ascertained and determined by the said collector to be due thereon; and thereupon the collector, as required by law, transmitted the invoice and all the papers and exhibits connected therewith and having any relation to the importations aforesaid to the board of general appraisers on duty at the port of New York, which board of general appraisers, on the 26th day of May, 1892, after hearing the evidence and considering the protests made and filed by the petitioner, affirmed the collector's classification and rating of duties chargeable upon the said Johann Hoff's malt extract, and finding the same to be a preparation known to commerce as a malt extract, as specifically defined in section 338 of the tariff act aforesaid, and subject to a duty of forty cents per gallon.

Seventh. Your petitioner further shows that, being dissatisfied with the decision of the board of general appraisers as to the facts, and the construction of the law respecting the classification of Johann Hoff's malt extract, and the rate of duty imposed thereon under such classification, it applied to the United States circuit court for the southern district of New York for a review of the question of law and fact involved in the decision of the said board of appraisers, and filed its petition in such court June 10th, 1892, in which it was declared that the board of general appraisers, in the decisions aforesaid, erred in matters of law as follows:

"*First.* In overruling your petitioner's protest against the decision of the collector.

"*Second.* In affirming the decision of the collector in classifying the said 'Johann Hoff's malt extract' as dutiable under section 338 as a 'malt extract' known to commerce, and in assessing duty thereunder at 40 cents per gallon.

"*Third.* In not holding said 'malt extract' to be a medicinal preparation, being a medicinal proprietary prepara-

tion of which alcohol is not a component part, and not specifically provided for in the act and included within paragraph 75 as dutiable at 25 per centum *ad valorem*.

"*Fourth.* In not sustaining your petitioner's protest, and in not reversing the decision of the collector in classifying the said 'malt extract' as dutiable under section 338, and assessing it thereunder."

And your petitioner further declared therein that the board of general appraisers erred in matters of fact as follows:

"*First.* In finding from the evidence that the said 'Johann Hoff's malt extract' was a 'malt extract' as known to commerce, and included in section 338, and subject to the duty therein stated.

"*Second.* In not finding from the evidence that the said 'Johann Hoff's malt extract' was in fact a medicinal preparation, being in fact a medicinal proprietary preparation, of which alcohol is not a component part, and the duty on which is not otherwise specifically provided for in the act, being dutiable under paragraph 75 of such act."

And thereupon your petitioner prayed for a review of the question of law and fact so involved in said decisions, and asked that Johann Hoff's malt extract—

"Be adjudged to be legally classified, rated, and dutiable under paragraph 75, as a 'medicinal preparation,' at twenty-five (25) per centum *ad valorem*, and that the excess of duty collected from your petitioner, to wit, the sum of two thousand five hundred dollars ($2,500) be ordered to be returned and refunded to your petitioner, and an accounting may be ordered by the proper officer of the Treasury of the United States."

Eighth. And your petitioner shows that such proceedings were had in the United States circuit court aforesaid, upon said appeal, that evidence was taken, heard, and considered by the court, and that after argument heard and considered it was found by the court, as an undisputed fact, that the said merchandise was imported as Johann Hoff's malt ex-

tract, and advertised, sold, labeled, and described in the protest by that name; that it is a compound of many ingredients, made by secret formula, consisting of herbs, roots, leaves, dextrine, water, hop extract, and twelve per cent. of malt extract; that it had long been known to the trade and commerce of this country; that it is a medicinal proprietary preparation, of which alcohol is not a component part, and upon the facts so found, and the law as determined by the court, it was, March 20th, 1893, adjudged and decreed by the court that the decision of the collector of the port aforesaid, and the affirmation thereof by the board of general appraisers, should be and was thereby reversed; and it was further ordered, adjudged, and decreed that Johann Hoff's malt extract should be classified under section 75, Schedule "A," of the tariff act of 1890, as aforesaid, as a medicinal proprietary preparation, of which alcohol is not a component part, and which is not specifically provided for in the act aforesaid, and the rate of duty imposed thereon under such classification was thereby fixed at twenty-five per centum *ad valorem*.

Ninth. And your petitioner further shows that such proceedings were had in the cause aforesaid that the Attorney-General of the United States applied for the allowance of an appeal to the United States circuit court of appeals for the second circuit from the decision and judgment of the circuit court aforesaid, which application was granted and the appeal allowed by the court April 6th, 1893, and that in said appeal the United States assigned error in the following particulars:

"*First.* In that the said court ordered, adjudged, and decreed a reversal of the decision of the board of U. S. general appraisers; that the merchandise in suit (Johann Hoff's malt extract) was, as decided by the collector of customs, dutiable at the rate of forty (40) cents per gallon as malt extract, fluid, in bottles, under the provisions for 'malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per

centum *ad valorem*,' contained in paragraph 338 (Schedule 'H') of the tariff act of October 1, 1890 (26 U. S. Stat., 590).

"*Second.* In that the said court ordered, adjudged, and decreed that the said merchandise should be classified for duty at the rate of 25% *ad valorem*, as a medicinal proprietary preparation, of which alcohol is not a component part, and not specially provided for in this act, under paragraph 75 (Schedule 'A') of the said tariff act of October 1, 1890.

"*Third.* In that the said court did not order, adjudge, and decree that the said merchandise was, as decided by the collector of customs, dutiable at the rate of forty (40) cents per gallon as malt extract, fluid, in bottles, under the aforesaid provision for malt extracts."

And thereupon the petitioner joined error.

Tenth. It is further shown by your petitioner that such proceedings were had therein, in the United States circuit court of appeals for the second circuit, that on the 29th day of January, 1894, it was ordered, adjudged, and decreed that the decision of the said circuit court should be in all things reversed; that the decision of the board of general appraisers, affirming the classification for duty of the collector of customs, should be in all things affirmed, and that Johann Hoff's malt extract should be rated and classified at the rate of forty cents per gallon as malt extract, fluid, in bottles, under the provision fer such malt extract contained in par. 338 of the tariff act of 1890, and that the bottles containing the same should be rated and classified at the rate of one and one-half cents per pound under the provisions of par. 103 of the same act, and that a mandate should issue, directing the circuit court to proceed according to law, which judgment and decree the petitioner is advised and believes to be erroneous in all respects and for the same reasons that are enumerated in the seventh paragraph of this petition.

Eleventh. And your petitioner states that the importance and gravity of the questions involved in the said cause and now presented to this Court will be recognized when it is

known that in the various protests still pending before the board of the United States general appraisers in the matter of the protests of the Eisner & Mendelson Company against the classification made by the collector of customs upon its importations of Johann Hoff's malt extract, and involving the same questions presented herein, together with the sum involved in this case, as shown by the affidavit of Moritz Eisner, filed in the circuit court of appeals, there are involved ten thousand dollars ($10,000.00) in money, which should be refunded to it as having been paid in excess of the amount chargeable under a proper classification, and that there is involved in this cause the construction of the statutes aforesaid and the application of the decisions of this Court in other cases predicated upon tariff legislation; and in this connection it is further represented by your petitioner that legislation now pending in the Congress of the United States in the form of revenue bills, using language similar to that contained in the tariff act of 1890, and that the conflict in the decisions rendered by the Treasury Department, the board of general appraisers, and the courts of the United States make it of the highest importance that all doubt about the interpretation of such statutes and the proper application of the decisions of this Court shall be finally and forever removed by the decision and judgment of this honorable Court.

Twelfth. Your petitioner thus respectfully submits that the questions of the proper and just interpretation of the statutes and the application of the decisions aforesaid upon the facts found in and presented by the case of your petitioner should be authoritatively and finally adjudged by this honorable Court, upon and after a full presentation to the Court of the merits of the said questions by the petitioner and the United States, in order that the citizens and officers of the United States may know and understand the law to be obeyed and enforced by them.

Thirteenth. In compliance with the 3d paragraph of rule 37 of this honorable Court, the petitioner files herewith, and as a part hereof by this reference thereto, a certified copy of the entire record of the case in the circuit court of appeals.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States circuit court of appeals for the second circuit, commanding the said court to certify and send to this Court, on a day to be therein designated, a full and complete transcript of the record and of all proceedings of that court in the said case entitled "The United States *vs.* Eisner & Mendelson Company," to the end that it and the questions involved therein may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the law, and that the judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by this honorable Court; and your petitioner will ever pray.

EISNER & MENDELSON CO.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys and Counsel for Petitioner.

STATE OF NEW YORK, }
City of New York, } ss.:

Moritz Eisner, being duly sworn, deposes and says that he is the secretary of the Eisner & Mendelson Company, which is a corporation duly and lawfully organized; that

he has read the above petition, and that the averments therein made are true to the best of his information and belief.

MORITZ EISNER.

Sworn to and subscribed before me this 23d day of February, A. D. 1894.

JOHN A. SHIELDS,
U. S. Commissioner, So. D. N. Y.

Endorsed on petition: Office Supreme Court U. S. Filed Feb. 26, 1894. James H. McKenney, clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSON COMPANY, Appellee. } No. 1133.

Comes now the Eisner & Mendelson Company, by its counsel, and moves the Court to issue out of and under the seal of the Court a writ of *certiorari*, directed to the United States circuit court of appeals for the second circuit, commanding that court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case, therein entitled "The United States, appellant, *vs.* Eisner & Mendelson Company, appellee," to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and that the petitioner be awarded such other or further relief or remedy in the premises as to the court may seem appropriate and in conformity with the act aforesaid, and that the judgment of the said circuit court of appeals in the case aforesaid and every part thereof be reversed by this honorable Court.

W. W. DUDLEY,
L. T. MICHENER,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

THE UNITED STATES, Appellant,
vs.
EISNER & MENDELSON COMPANY, Appellee. } No. 1133.

To the Attorney General of the United States:

Please to take notice that on Monday, the nineteenth day of March, 1894, at the opening of the Court, or as soon there-

after as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Copies of the petition filed by the Eisner & Mendelson Company for the writ of *certiorari*, a transcript of the record of the case in the circuit court of appeals for the second circuit, and a copy of the brief of the petitioner will be furnished you as soon as printed, and will be used in support of the motion aforesaid.

W. W. DUDLEY,
L. T. MICHENER,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Louis T. Michener, of lawful age, being duly sworn according to law, deposes and says that he is one of counsel for petitioner in the case of The United States, appellant, *vs.* Eisner & Mendelson Company, appellee, No. 1133, now pending in the Supreme Court of the United States, and that on the twenty-eighth day of February, eighteen hundred and ninety-four, he served the above notice and motion upon Richard Olney, the honorable the Attorney General of the United States, and left copies thereof in his possession.

LOUIS T. MICHENER.

Subscribed and sworn to before me this 28th day of February, A. D. 1894.

[SEAL.]

S. P. SQUIER,
Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 1133.

UNITED STATES, Appellant,

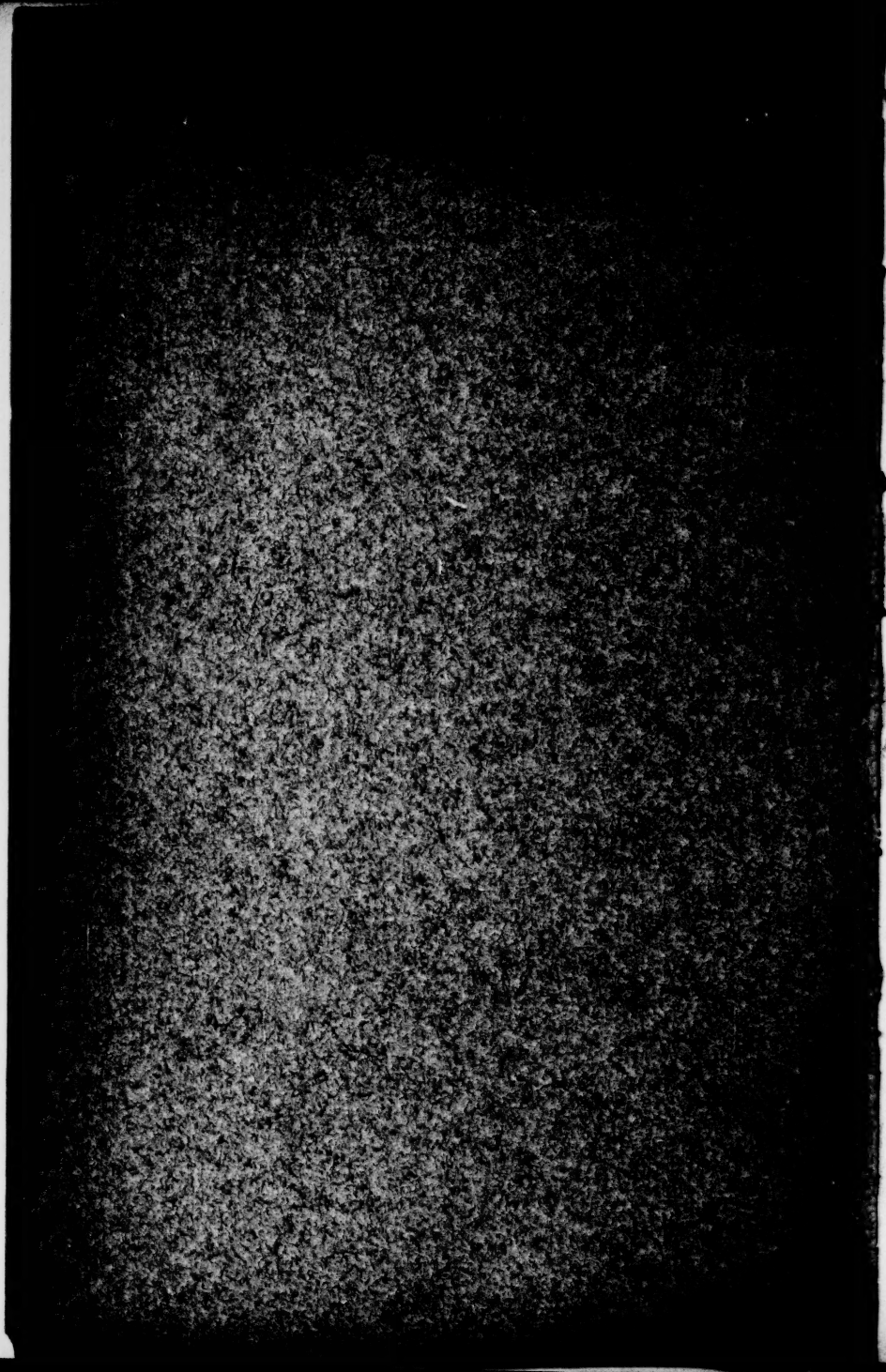
vs.

BISHER & MENDELSON COMPANY, Appellee.

BRIEF OF BISHER & MENDELSON CO.

W. W. DUDLEY,
L. Y. MCCLINTOCK,
CHAS. A. RAY,
Counsel.

Press of Byron S. Adams, Washington, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1133.

UNITED STATES, APPELLANT,

vs.

EISNER & MENDELSON COMPANY, APPELLEE.

BRIEF OF EISNER & MENDELSON COMPANY.

The question of law presented for decision in this case is whether Johann Hoff's Malt Extract is subject to duty under the 75th paragraph of the act entitled "An act to reduce the revenue and equalize duties on imports, and for such other purposes," approved October 1st, 1890, and commonly known as the "tariff act of 1890," which is as follows:

"All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, twenty-five per centum ad valorem." * * *

Or whether it should be classified, rated, and charged under paragraph 338 of the tariff act aforesaid, which is as follows:

"Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid, or condensed, forty per cent. ad valorem."

The Collector and the Board of General Appraisers held that the importation was covered by paragraph 338, but the Circuit Court held that paragraph 75 applied. On appeal to the Circuit Court of Appeals for the second circuit, the judgment of the Circuit Court was reversed, and the decision of the Collector and the Board of General Appraisers affirmed.

The purpose of this proceeding is to obtain a review by this Court of the questions involved in the record, in accordance with section 6 of the act of March 3, 1891, relating to the Circuit Courts of Appeals.

The Decision of the Circuit Court.

The opinion of Coxe, circuit judge, is copied in full in the Record, pp. 38–40, and it is so well supported by his reasoning, and the authority cited by him is applied to the facts with such clearness and completeness of detail, that we hesitate to attempt further discussion.

We call attention, however, to the case of *Saxonville Mills* v. *Russell, Collector*, 116 U. S., 13, in which it is declared by this Court that the whole tariff revenue system, consisting of numerous acts enacted at different times, must be regarded in the construction of each alteration, and no disturbance should be allowed of existing legislative rules of general application, beyond the clear intention of Congress.

One of the best settled rules in the interpretation of statutes is that, where courts have declared the meaning of a phrase, or the classification of a subject, all subsequent legislation is presumed to proceed on the basis of such decisions; and legislative intent must be strongly shown before a departure from this construction can be permitted. The words "malt extract" were not inserted in the tariff act to overrule the then existing classification of Hoff's Malt Extract as a proprietary medicinal preparation. The ruling in *Ferguson* v. *Arthur*, 117 U. S., 482, is conclusive that no

such result could follow such legislative action. "Johann Hoff's Malt Extract" is not manufactured in the United States, nor is any article of like composition manufactured therein, R., p. 27–50. The purpose of the tariff act is the protection of American industries from foreign competition, as well as the creation of a revenue. The protection is for the malt extract of commerce which is manufactured here (Record, p. 31), and is also imported (p. 29) in bulk and in bottles.

A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. *Suth. Stat., Const.*, secs. 218, 219; *Reiche* v. *Smythe, Collector*, 13 Wall., 162.

Where the court is satisfied that adherence to the strict letter of the law would not accord with the object and intent of legislation, it is the duty of the court to regard the intent, even where to do so it is compelled to restrain the application of the letter. *Ibid.*

Such a construction is to be given a remedial statute as will suppress the mischief which it was intended to destroy, and advance the remedy provided. *Suth. Stat., Const.*, secs. 348, 409, 410, 411, 412.

Statutes must be interpreted according to their intent and meaning, and not always according to their letter. *Ibid.*, secs. 218, 219, 323.

A statute often speaks as plainly by inference, and by means of the purpose which underlies the enactment, as in any other manner. *Ibid.*

Applying the foregoing rules of interpretation, we respectfully submit that the decision of the general appraiser, February 26, 1891, in case No. 10863 (G. A. 358), is erroneous. What the special facts appearing in that appeal were we, of course, do not know and we cannot, therefore, regard the decision as specially in point, except so far as it proceeds upon the supposition that, specific provision not having been made for "malt extract" in the tariff law under

which the decisions of June 19, 1876, and of April 19, 1881, were rendered, declaring "Johann Hoff's Malt Extract" dutiable as a "medicinal proprietary preparation," therefore these decisions were not controlling in the decision of February 26, 1891, above cited, inasmuch as paragraph 338 provides specifically for "malt extract," and it is said that "it is a familiar rule that a specific designation *eo nomine* must prevail over general terms, and the commercial designation of an article is a standard by which its dutiable character is fixed."

Upon this point we ask attention to the decision of the Supreme Court of the United States in *Ferguson* v. *Arthur, Collector*, 117 U. S. 482. In that case the question was as to the classification of "Henrys' Calcined Magnesia." It was contended that the article was dutiable under section 2504, Revised Statutes, schedule page 477: "Magnesia: carbonate, 6 cents per pound; calcined, 12 cents per pound." The argument was, as in the decision of the general appraiser of February 26, 1891, that, because the duty of so much a pound was laid in that case on calcined magnesia by that specific name, this "Henrys' Calcined Magnesia" imported in bottles and sold by the bottle by that name cannot be dutiable under the general designation of a proprietary medicine.

But this is answered by Judge Blatchford, by the argument that Henrys' article is not the ordinary calcined magnesia, dutiable by the pound; but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia, calcined. The court further say that a "medicinal preparation might be proprietary without being made by private formula, or under an exclusive right claimed to the making or preparing it, or under a patent."

In the case now pending, Johann Hoff's Malt Extract "is not in any sense what is known in commerce as 'malt

extract.' It is a liquid preparation of various ingredients in conjunction with malt extract, and is designed to be used and is used for medicinal purposes * * * in the treatment of certain diseases, such as indigestion, malnutrition, general debility, etc.," and as such is recommended and prescribed by the highest medical authorities. (The evidence to this effect is hereafter cited.) This has been expressly decided, in these very words, and of this identical article (see Treasury Decision, 2867, 4834), and it will not do now to change that ruling, simply because, by so doing, an article whose status has once been fixed can be subjected to an increased duty by another ruling. Some respect should be paid to the decisions of the Treasury Department upon the same question. The contemporaneous construction of a statute, by the executive officers of the Government whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts. *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Heath* v. *Wallace*, 138 U. S. 573. Especially where legislation has followed the decisions, is this true. The proof in this case shows also that "Johann Hoff's Malt Extract" is not commercial "malt extract," as we shall establish later on.

There is no such classification known to the law as "non-commercial malt extract." As was said in *American Net & Twine Company* v. *Worthington*, 141 U. S. 471, 472, "It is a cardinal rule of this Court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market, when the law was passed, will control their classification without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied." To this proposition numerous cases are cited. If the article in question is not commercially known as "malt extract," it is not within the exclusive words of the statute, although it may contain 10 per cent. of what may be known

scientifically as "malt extract," or may be called "Johann Hoff's Malt Extract."

This being the rule where the statute does not take into consideration, in making the classification, the use for which the article is prepared, much more reason exists for the enforcement of the principle where the article is not known commercially by the name under which the collector classifies it, and the statute expressly declares that its use as a "medicinal proprietary preparation" shall fix its classification.

In *Hedden* v. *Richards*, 149 U. S. 346, the Court use this language: "The question is, therefore, whether, if a term used in a tariff law has a general meaning, as understood by society at large, and also a special trade signification, it is to be presumed that Congress used the word in its general sense or in its trade sense."

"With regard to *the language of commerce*, the general rule laid down by this Court is that it *must be construed, when used in laws imposing duties* on importations of goods, and particularly when employed in the denomination of articles, *according to the commercial understanding of the terms used*. *United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet. 277; *Elliott* v. *Swartwout*, 10 Pet. 137. While it is true that 'language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown' (*Swan* v. *Arthur*, 103 U. S., 597, 598), yet 'the commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws; * * * a specific designation *eo nomine* must prevail over general terms, and a commercial designation is the standard by which the dutiable character of the article is fixed.' (*Arthur* v. *Lahey*, 96 U. S., 112, 113, 114.) This rule is equally applicable where a term is confined in its meaning, not merely to commerce, but to a particular trade, and in such case also the presumption is that the term was used in its trade signification."

Application of the Law to the Evidence.

On pages 13 to 16 of the Record is found the evidence of Max J. Breitenbach, a retail pharmacist having his place of business at Madison avenue and 57th street, New York. He has been engaged in this business here for 18 years, and is a graduate of the New York College of Pharmacy. He states that what is known commercially as extract of malt is that extract which is made according to the Pharmacopœia. This is recognized as malt extract in this country and in Europe. It is an extract of malt of a semi-solid syrupy consistency, containing no alcohol, and is an extract of barley malt purely. This is the only thing bought and sold or understood in the profession or business as malt extract. This witness states that Johann Hoff's Malt Extract, or Beer of Health, here in question, does not come within the commercial designation of malt extract, but is regarded as a proprietary medicine, and is bought and sold by the trade as a patent medicine. As a matter of fact, it is sold only as such (R., p. 28) and it is directed to be used only as a medicine for special diseases (R., Exhibit F) and in prescribed doses.

On pages 17–22 of the Record Andrew J. Ditman, a retail apothecary at Broadway and Barclay streets for 25 years, adds to the malt extracts, as recognized commercially, a dry malt extract, or powdered extract of malt, made under Liebig's formula, but reduced to a dry state. Johann Hoff's Malt Extract, he states, is known commercially as a proprietary article.

Alfred H. Kennedy, whose testimony commences on page 22 of the Record, states that he has been engaged in the "apothecary and druggist sundries business" for 28 years; that he is a member of the corporation known as the Charles N. Crittenton Company, of this city. His duties are as a buyer. He is familiar with Johann Hoff's Malt Extract and places it as a proprietary article. He states that it is not

known among the trade in any other manner than as a proprietary medicine—"as a proprietary article for medicinal purposes." On page 24, f. 113, he states that it is not sold on the market as a commercial malt extract.

Daniel R. Chichester, whose testimony is on page 25, testifies that he made application at various wholesale druggists for malt extract, and produced two bottles that were given upon his application, and which are shown by other evidence, subsequently, to come within the designation of malt extract, as known among commercial men.

We call attention especially to the testimony of Chichester, as tending to show what was known to the trade as "malt extract," as in response to his demand for "malt extract," at two reputable and large business houses, he was given, and he paid for, the article commercially known as "malt extract," which is in evidence, and is totally different in composition from the "Johann Hoff's Malt Extract" in question.

The following testimony seems to settle conclusively the question as to what, in the "commercial sense," "denomination in the market," and "commercial understanding," the term "malt extract" was understood to be at the time. See Record, page 13, testimony of Breitenbach; page 17, Ditman; page 22, Kennedy.

Moritz Eisner, whose testimony is on pages 26–33 of the Record, states that he is an importer of drugs, mineral waters, and has been a druggist for the last 25 years in Europe, Philadelphia, and New York; he has been actively engaged as a druggist and chemist, working in laboratories here and abroad; has manufactured, bought, and sold extracts of malt, and has been importing Johann Hoff's Extract for the last 15 years. and selling various malt extracts. He states that "the trade and commerce" understand "malt extract" to be a semi-solid preparation, which is the cold extraction of barley evaporated in a vacuum. In later years, through the improvements of science,

this was, by further evaporation, brought down to powder, and, in fact, the trade now generally accepts the dry extract of malt as a commercial article—as a real extract of malt. Both the dry and the semi-liquid extracts are known to commerce as the extract of malt, when prepared in the manner described. The witness states that the trade, both here and abroad, classify the Johann Hoff's Malt Extract as a patent medicine or proprietary article, manufactured under a secret process known to Johann Hoff, or those in the firm of Johann Hoff, and to no one else; a preparation that has been made according to Johann Hoff's own idea and notion of a malt extract, and which he brought into the market under the name of Johann Hoff's Beer of Health, and recommends for diseases of the stomach, liver, etc. The difference between Johann Hoff's Malt Extract and the article known to commerce as "malt extract," is that the malt extract of commerce is made by the cold infusion of barley without any other addition; Johann Hoff's is made by a hot infusion of barley, to which is added various other ingredients which never enter into the composition of malt extracts. Johann Hoff's Malt Extract, in fact, contains only 12 per cent. of what is known to commerce as malt extract. It is never offered for sale except in the form and with the labels introduced in evidence in this case. (See Exhibits, pp. 36–38.) It has been manufactured only by Johann Hoff and his sons, and has been known personally to the witness for the last 25 years, but has been in the market many years longer. The trifle of alcohol contained in the preparation is not introduced originally, but is produced by the natural fermentation of the component parts *after* its composition and bottling. As little alcohol is introduced by all manufacturers of so-called malt extracts as possible, for it defeats to that extent the purpose, medicinally, of the preparation. Hoff uses, therefore, no alcohol in his formula, nor is any found in his finished product, save the very insignificant per cent. produced, after bottling, by natural fermentation.

Under such conditions, it would be an abuse of language to say that 2.85 per cent. of alcohol constitutes a component part.

(See Decisions of Appraisers, Oct. 1, 1893, p. 1035, No. 13,341; case No. 6871, Treasury Decisions, p. 159, Dec. 1, 1885; Notes to Handbook of United States Tariff, 2d ed., p. 62; Decisions of Treasury (1889), 9350, 9449, 9036, 9199, 9389.)

Francis Wyaw testifies, on page 33 of the Record, that he is an engineer of arts and manufactures in the Central School of Paris, and doctor of philosophy at Brussels University. He has been consulting and analytical chemist to the brewing and the malting industries. He defines a malt extract as a cold infusion of malt evaporated to a semi-solid consistence, or, for the convenience of transportation, evaporated to dryness in a vacuum, at a temperature not exceeding 130 degrees Fahrenheit. Its substantial quality is its saccharifying or liquefying action on starch. The witness states that Johann Hoff's Malt Extract is not classed as a "malt extract;" that he regards it as a medical beer, meaning a beer prepared from malted barley and hops, to which has been added various organic compounds which cannot be distinguished by any analytical process. It contains 2.85 per cent. of alcohol and 8.72 per cent. of solid matter, of which 3.4 per cent. is of the nature of extractive bodies of malt. The liquid originally contained about 10 per cent. of malt extract, of which about 5 per cent. has been converted into alcohol by fermentation, leaving the per cent. of alcohol as it stands 2.85 per cent. The witness classifies A, B, and D as malt extracts, or the extracts of malt, and he states, the difference between Hoff's Malt Extract, and the exhibits referred, to be that Hoff's is a fermented extract containing alcohol, while the other extracts are not fermented, and are the cold solutions of the extraction of a mass of barley malt. The witness states that these classifications are made without any reference to their preparation or proprietary char-

acter, or to anything but to their analytic contents by themselves. He says that his definition of a malt extract is the generally accepted definition in the scientific text-books, and it is the definition given in trade. The witness states that buyers and sellers come to him to determine whether certain articles are malt extracts or not.

In the case of *Ferguson* v. *Arthur*, already cited, calcined magnesia was the main ingredient in the preparation; but in Johann Hoff's Malt Extract it is stated, in the opinion of February 26, 1891, that a sample bottle of the article was found to contain maltose, dextrine, ash, coloring matter, hop extract, albuminoids and water, etc., and by the proof it is shown to contain but twelve (12) per cent. of malt extract.

As the "Johann Hoff's Malt Extract" is protected as a trade-mark by the United States letters patent, it comes unquestionably within the definition of "proprietary medicinal preparations" given by the Supreme Court.

In the opinion of *Ferguson* v. *Arthur*, *supra*, it is said that, "although it appeared at the trial that all calcined magnesia 'is a well-known medical preparation of magnesia, made from sulphate of magnesia, bicarbonate of soda and calcined by heat,' and that a formula for the preparation was contained in the dispensatories, it did not appear that Henrys' preparation was made according to that formula; while it did appear that it was universally known by the name of 'Henrys' Calcined Magnesia,' and had a character of its own, distinct from ordinary calcined magnesia, though used for the same purposes, and that it had been prepared by the same family at Manchester for 100 years, and had a peculiar reputation on account of the nicety with which it was prepared, and a peculiar value in the market, shown by the price it commanded. We cannot doubt that this was an article recommended to the public as a proprietary medicine, within the statute. It may fall within that clause without being prepared according to some private formula

or secret art, as a remedy for disease. The statute is in the alternative."

The court adopts the definition of "proprietary" in the Imperial Dictionary; that is, "belonging to ownership—as proprietary rights." In Webster: "belonging or pertaining to the proprietor." "Proprietor" being defined as "one who has a legal right or exclusive title to anything—whether in possession or not; an owner." In Worcester: "relating to a certain owner or proprietor."

Under this definition Mr. Justice Blatchford says: "It is quite plain, we think, that Thomas and William Henry recommended their calcined magnesia to the public as a medicine in which they had a proprietary right, as owning all that there was of good will and business reputation appurtenant to the article, resulting from its name, and from what they stated about its manufacture. They prepared it and put it up in glass bottles in each of which was blown the words "Henrys' Calcined Magnesia, Manchester." Over one end of each bottle was pasted an English revenue stamp with their name on it. They announced a property in the trade-mark, "Henrys' Calcined Magnesia." They called it "their calcined magnesia." They announced J. and S. Ferguson as their sole wholesale agents in the United States. They recommended the article as of superior quality, because of improvements which they had made in its manufacture, and stated, as a result of these improvements, that the article had "no carbonic acid, no taste, smell or other disagreeable property, and no roughness or grittiness to the touch or palate."

It is said, again, "that the article in question is a medicinal preparation, there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a 'medicine.'"

In the Johann Hoff's Malt Extract circular it is not only styled a "medicine," but the advice is given that it should be taken under the direction of a physician.

All this evidence is paralleled in the case we now submit for decision, and it is impossible, without disregarding the decision, *Ferguson* v. *Arthur*, to escape from its controlling force. Indeed, the conclusiveness of this decision must have been recognized in case No. 10694 (G. A. 268), in the matter of Protest 2503 B., of Redington & Co., against the assessment of duty by the collector of San Francisco, in "De Jough's Cod Liver Oil," imported per "Hospodar," October 20, 1890. The decision was of January 23, 1891, and is as follows:

"From the report of the local appraisers it appears that the merchandise in question, known as 'De Jough's Cod Liver Oil,' is a proprietary medicinal preparation. Duty was assessed upon it at 25 per cent. ad valorem, under paragraph 75, act of October 1, 1890. The importers claim that the proper rate be 15 cents per gallon under paragraph 38. The contention is based upon the nomenclature of the substance. The name alone, however, is not deemed sufficient by us to control its classification. It is not the cod-liver oil of commerce, but is a preparation compounded of several ingredients other than alcohol, of which cod-liver oil is the base, and is probably chief ingredient in value. But the mixture of the several substances into a preparative of a medicinal character, which, from the evidence, is found to be proprietary, clearly brings it within the scope of paragraph 75."

It seems to us impossible that the decision in 10863 (G. A. 358) February 26, 1891, before alluded to, can stand, for the reasoning upon which it was based, is inconsistent with the rulings just cited in 10684 (G. A. 268) and opposed to the decision of the Supreme Court, in *Ferguson* v. *Arthur*, *supra*.

Paragraph 38 reads: "Cod-liver oil, 15 cents per gallon," and is held to be a "proprietary medicinal preparation," because of the prefix of the proprietor's name.

Paragraph 338 is: "Malt extract fluid, in casks, 20 cents per gallon; in bottles or jugs, 40 cents per gallon; solid or

condensed, 40 per cent. ad valorem." The prefix of the name "Johann Hoff" should have the same effect as in the "cod-liver oil" case.

The decisions of the Treasury Department which fix the classification of "Johann Hoff's Malt Extract" are stated, upon their face, to have been made upon full investigation. The proof in the case at bar identifies the article with that classified by the Treasury. The effect of the decision of the Supreme Court in *Ferguson* v. *Arthur*, already cited, is to declare that the specific duty for "malt extract" in the present tariff cannot take a proprietary preparation out of its class, as it could not take out Henrys' Calcined Magnesia, where the specification was still more definite than that of "malt extract."

The decisions referred to are as follows:

(2867.)

Johann Hoff's Malt Extract—Classification of.

TREASURY DEPARTMENT, *June* 19, 1876.

SIR: Your letter of the 16th inst. is received, transmitting the appeal (686) of A. Shumaker & Co. from your decision assessing duty at the rate of 40 per centum ad valorem on certain "Johann Hoff's Malt Extract" imported per *Ohio*, June 3, 1876, which the importers claim to be dutiable at the rate of 20 cents per gallon as beer.

It appears upon investigation that the malt extract in question is a specialty of the establishment of Johann Hoff, the proprietor; that it is recommended by competent authority as of special advantage in diseases of the chest and stomach; also for piles, weak digestion, and general weakness, but to be used always under the direction of a physician; and that it is put up in glass bottles of a certain form, each bottle sealed, stamped, and labeled, the label setting forth the medicinal merits, &c., of the contents.

Under these circumstances, the merchandise being in fact a "medicinal preparation or composition, recommended to the public as a proprietary medicine, remedy, or specific for

the cure of certain diseases or affections of the human or animal body," the department concurs with you in the opinion that it is not covered by department's decision of July 10, 1875 (Synoptical Series 2336), relating to certain malt extract in casks, nor is it liable to duty at the rate of 40 per centum ad valorem as a "medicinal preparation not otherwise provided for," but that it is dutiable at the rate of 50 per centum ad valorem under the provision in Schedule "M" for "proprietary medicines."

You are therefore directed to reliquidate the entry accordingly, and to take the necessary measures for collecting the duties still due by the importers.

The invoices enclosed in your letter are herewith returned.

Respectfully,

By order: C. F. BURNAM,
Assistant Secretary.

Collector of customs, Baltimore, Md.

(4834.)

Johann Hoff's Malt Extract imported in casks—Duty on.

TREASURY DEPARTMENT, *April* 19, 1881.

SIR: The department is in receipt of your letter of the 14th instant in relation to the classification of Johann Hoff's Malt Extract when imported in casks or bottles not stamped and labeled.

It is understood from the report of the appraiser, submitted by you, that the said article, notwithstanding the manner in which it is put up for the purpose of importation, is identical with the "Johann Hoff's Malt Extract" which was the subject of the department's ruling of June 19, 1876 (Synopsis 2867), and which was thereby held to be dutiable at the rate of 50 per cent. ad valorem, as a "proprietary medicine," it being a "specialty of the establishment of Johann Hoff, the proprietor," and as such recommended by competent authority to be of special advantage in diseases affecting the human body.

Such being the case, the department, in accordance with the principle enunciated in its ruling of the 28th ultimo. (Synopsis 4809), decides that the said article, no matter in what form it may be imported, is dutiable at the rate of 50 per cent. ad valorem, as a "proprietary medicine."

The ruling July 10, 1875 (Synopsis 2338), on "malt extract" in casks, was not intended to cover a proprietary medicinal article of this character, and therefore it will not be considered as affecting the question submitted by you.

In a recent case, at Philadelphia, the department decided that the "Johann Hoff's Malt Extract" imported in bottles not stamped and labeled was dutiable as aforesaid.

You will be governed accordingly.

Very respectfully, H. F. FRENCH,
Assistant Secretary.

Collector of customs, New York.

See, also, to the same effect, No. 6917, May 15, 1885.

These findings of the Treasury Department in regard to the character of "Johann Hoff's Malt Extract," stand unreversed and in full force. They bring the case squarely within the decision of this in *Ferguson* v. *Arthur* It appears in evidence that "Johann Hoff's Malt Extract" was introduced, in 1847, as "The Best Nutritive Tonic for Indigestion, Malnutrition. A Sovereign Remedy for the Weak, for General Debility and all Pulmonary Diseases," Exhibits F and G. The circulars, by which only it is placed on sale (p. 28), are made part of the Record (pp. 36–37) in this case, and to them we respectfully invite attention. See decision Board of Appraisers, October 13, 1893.

The decision of this Court, in *Arnold* v. *The United States*, 147 U. S. 494, seems to us to support our claim that "Johann Hoff's Malt Extract" is properly classed as a medical preparation, being a medicinal proprietary preparation not specifically provided for elsewhere in the act, and that it should not be classed under section 338 as a "malt extract." Our contention is that the term "medicinal preparation, including medicinal proprietary preparations," is a more specific definition than the term "malt extract."

In *Arnold* v. *United States*, it was contended that the words used in paragraph 392, "woolens or worsted cloths, shawls, knit fabrics and all fabrics made on knitting machines or frames, and all manufactures of every description, made

wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animal, not specifically provided for in this act," was a more definite description of knit woolen shirts, drawers, and hosiery than the words contained in paragraph 396, "Clothing, ready made, and articles of wearing apparel of every description, made up or manufactured, wholly or in part, not specifically provided for in this act." Mr. Justice Brewer, in deciding the question, says, "Each paragraph, as will be noticed, contains the words 'not specifically provided for in this act,' and the contention of appellants is that the enumeration in paragraph 392 is more specific, and that therefore it should control, referring, in this connection, to *Solomon* v. *Arthur*, 102 U. S. 208, 212; *Hartranft* v. *Meyer*, 135 U. S. 237. But we think that the reverse is true, and that the description in 396 is more of a specific enumeration than that in 392. Clothing and articles of wearing apparel are more specific than cloths and knit fabrics. Out of cloths and knit fabrics, clothing and wearing apparel are made. The latter are included within the former, while the former are not included within the latter. So, if the decisive matter was a more special enumeration, we think 396 would be preferred."

Our contention accords with this. It is, that "medicinal proprietary preparations" is a more specific designation than the words "malt extract." Out of "malt extract," "medicinal proprietary preparations" may be made, and are, in such case (but only to the extent of the use made of the extract), included within the term "medicinal proprietary preparation."

By the evidence introduced on the trial it was shown that but twelve (12) per cent. of "malt extract" entered into the composition of the medicinal proprietary preparation called "Johann Hoff's Malt Extract," or "The Sanitary Beer of Health of Johann Hoff, Berlin."

This decision, it seems to us, but enforces the ruling in *Ferguson* v. *Arthur, Collector*, 117 U. S., 482. In that case,

which was as to the classification of "Henrys' Calcined Magnesia," it was contended that the article was dutiable under section 2504, Revised Statutes, schedule page 477: "Magnesia—carbonate, 6 cents per pound; calcined, 12 cents per pound." The plaintiff's argument was that, "because the duty of so much a pound is laid on calcined magnesia by that specific name, this Henrys' calcined magnesia imported in bottles and sold by the bottle by that name, cannot be dutiable under the general designation of a proprietary medicine." Mr. Justice Blatchford held that Henrys' calcined magnesia is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia calcined.

If we were to apply the reasoning of Mr. Justice Brewer in *Arnold* v. *United States*, *supra*, it would be held that magnesia calcined is included within Henrys' calcined magnesia, while the latter (Henrys' calcined magnesia) is not included within the former (magnesia calcined). So, with "Johann Hoff's Malt Extract" it must be held, as we think, "malt extract" is included within "Johann Hoff's Malt Extract, or the Sanitary Beer of Health of Johann Hoff, Berlin," but the latter is not included in the term "malt extract." Something is done to that "malt extract" by Johann Hoff, or under his formula, which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although a small element of it, about twelve (12) per cent., is malt extract.

Circuit Judge Coxe, in his opinion (R. 38–40) said:

"That it is a medicinal proprietary preparation is not disputed, and it is not argued for the collector that it contains alcohol. It is thought, therefore, that paragraph 75 specifically describes it, and that the collector should have classified it under that paragraph.

"It is not often that an authority is found which is an exact precedent for the case in hand. There are always some distinguishing facts, but the case of *Ferguson* v. *Arthur*, 117 U. S., 172, approaches much nearer than is usual to the facts of the present case. In principle the two cases are identical.

"'Henrys' calcined magnesia' was held to be dutiable as a 'proprietary medicine,' although another paragraph assessed duty upon 'magnesia, calcined, twelve cents per pound.' Indeed, it would seem that the merchandise in the Ferguson case was much nearer to 'magnesia, calcined,' than the merchandise here is to 'malt extract, fluid.' It was, in fact, calcined magnesia, but prepared by a secret formula which gave it peculiar advantages. Here the merchandise in question is not in a proper sense 'malt extract' at all.

"It will be seen by the following comparison that every argument applicable to 'Henrys' calcined magnesia,' applies with equal or greater force to 'Hoff's malt extract.'

Henry's Calcined Magnesia.	*Hoff's Malt Extract.*
"It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market.	It has been prepared by the same family, a firm of manufacturing chemists in Berlin, Germany, for the last twenty-five years and over, and has a peculiar value in the market.
"That the article in question is a medicinal preparation there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a 'medicine.'	That the Hoff extract is a medicinal preparation there can be no doubt. The circulars and labels set forth its virtues as a remedy in disease, call it a 'medicine,' and recommend that it should be taken under the advice of a physician.
"It has a character of its own, distinct from the ordinary calcined magnesia, which must arise from the special mode of manufacture.	It has a character of its own, distinct from the ordinary malt extract, which arises from the special mode of manufacture, and from the fact that only twelve per cent. of malt is used.
"Henrys' article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia calcined.	Hoff's article is not the ordinary malt extract dutiable by the gallon, but something is done to the small percentage of malt extract found there, together with the other ingredients by Hoff, which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine. The base of it is not shown to be malt extract.

"The court does not lose sight of the distinctions pointed out by the counsel for the collector, based upon the changed language of the tariff, since the decision of the Ferguson case, but it seems to the court, in view of the principle there enunciated and of the conceded facts, that the article in question contains but twelve per cent. of malt extract, and is a proprietary medicine put up by a secret formula; that it is more appropriately assessed under paragraph 75 than under paragraph 338.

"Immutability of the law is a wise maxim of political economy, which is too often lost sight of by the legislative power, both State and National. Frequent alteration, whether by the legislature, or by those who interpret the law in the first instance, unsettles business and retards prosperity. By adopting a reasonable uniformity of construction the courts, as far as possible, should see to it that commerce is not vexed by unnecessary changes. For fifteen years the merchandise in question has entered our ports as a proprietary medicine. No reason exists for a change now."

THE DECISION IN THE CIRCUIT COURT OF APPEALS.

This opinion is in the Record on pp. 45, 46, 47, and the court said, in part:

"Johann Hoff's malt extract is a compound of several ingredients, prepared according to a secret formula; it is a medicinal proprietary preparation; it contains a little alcohol, which, however, has not been added as a component, but is generated in the mixture itself. The malt extract in the compound bears to the other ingredients the proportion of 12 to 88, but it is advertised, labelled, and described by the makers and their agents as a malt extract; is imported as such, and has been at all times bought and sold as a malt extract in the trade and commerce of this country. Other proprietary preparations containing malt extract are similarly advertised, labelled, described, bought and sold, each with the name of the particular proprietor prefixed to the words 'malt extract.' The trade nomenclature of these articles has an important bearing upon the interpretation to be given to the 338th paragraph above cited. 'In fixing the classification of goods for the payment of duties the name or designation of the goods is to be understood in its known

commercial sense; their denomination in the market will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied.' *American Net and Twine Co.* v. *Worthington*, 141 U. S., 471."

We submit that the court did not correctly quote the language of the Supreme Court, and that the rule really stated by this court in the language actually used was not applied to the facts in the case then under consideration.

It is said in that case:

"The decision of this case depends upon the construction of the tariff act of March 3rd, 1883. Schedule J of this act, page 507, provides for a duty of 40 per cent. *ad valorem* upon 'flax or linen thread, twine and pack thread, and all manufactures of flax, or of which flax shall be the component material or chief value, not specially enumerated or provided for in this act,' while a subsequent paragraph of the same schedule imposes a duty of 25 per cent. *ad valorem* upon 'seines and seine and gilling twine.' The question is, in which category, under the finding of facts, these goods are to be assigned. We think the following extract from the finding is decisive in favor of the position taken by the plaintiff in error: 'For many years before the Tariff Act of 1883, this kind of thread of the manufacture of W. & J. Knox and other foreign makers, was imported under the name of gilling twine, to be used in making gill-nets, and was invoiced and entered at the custom-house under that name, and was so designated on price-lists and trade circulars of the foreign makers. For many years before the act *no other imported article was known by the special name of gilling twine.*' [Here follows the language attempted to be quoted by Judge Lacombe in his opinion in this case. Its application by the Court certainly limits the general language actually used.]

"It must be assumed that Congress in imposing a duty upon 'gilling twine' *eo nomine*, intended that some article used for the purpose of manufacturing gill-nets should pay duty as such, and as the article in question is and was, for many years before the act was passed, imported, invoiced and entered at the custom-house under that name and was

so designated in price-lists and trade circulars, *and was actually intended for use in the manufacture of gill-nets, and no other article was imported under that name*, it follows that it should be classified as such, *notwithstanding it is in fact linen thread, and when intended for sewing purposes is invoiced and entered as linen thread.*" * * *

"We are bound, however, to give some effect to the words 'gilling twine,' *and if there be no other imported article of that name, it follows conclusively that this must have been the article intended. Nor is this* inference *greatly weakened* by the fact that the *article is nothing less than linen thread, differing not in material, quality, or mode of manufacture* from other similar thread; that nine-tenths of the thread so imported is used *for other purposes than gilling*, and that *when so imported* it is *invoiced* and entered as *linen thread, and is so known in commerce and designated on price-lists and trade circulars.* It would appear from the Treasury reports and circulars to admit of some doubt whether there is an absolute identity between the thread used for gilling and that used for sewing; but *it is not necessary for us to determine whether the same duty should be imposed if the same article be imported for different purposes.* Of course, *this would follow only in case the two articles were absolutely identical*, and if, as found by the Board of General Appraisers of New York, to which reference has already been made, the *difference between the two is so marked as to render them easily separable, the question of identity would not arise.* It was found by them that the machine thread is a harder twist and contains more sizing than the gilling, and that the former could not be satisfactorily used for the manufacture of gill-nets. It is sufficient for the purposes of this case to hold that, *when imported as gilling, for the manufacture of gill-nets, it is liable only to the duty of 25 per cent.*"

In the pending case, "Johann Hoff's Malt Extract" is imported as a "Medicinal Proprietary Preparation," and it is "easily separable" from the "Extract of Malt" known to commerce, and which is not imported as a "Medicinal Proprietary Preparation." If "linen thread," expressly named as subject to 40 per cent. *ad valorem*, is only subject to an *ad valorem* duty of 25 per cent. when imported for

making gill-nets, why should not "Johann Hoff's Malt Extract," containing only 10 per cent. of malt extract, be subject to the same rule?

It seems, then, that in fact the material out of which the articles may be made, if so marked as to render them "easily separable," would prevent "the question of identity" from arising. In the present case, the evidence *is without conflict, that the only article known to commerce as "Malt Extract"* is that which, either dry or liquid, *is prepared according to the Pharmacopeia*, a standard authority in this country, and which is "an extract of barley malt purely," (*pp.* 13–34).

It is, also, shown by the same evidence that "Johann Hoff's Malt Extract" is not known in the trade as a "Malt Extract."

It is, also, proven that "Johann Hoff's Malt Extract" is "easily separable" from the article known to commerce as "Malt Extract." Pp. 17–34.

It is in evidence, uncontradicted, that there is imported an article known to commerce as "Malt Extract" to which paragraph 338, fixing the duty on malt extract, does apply. Pp. 16–31.

It is equally clear, as the opinion in this case states, that "Johann Hoff's Malt Extract" is a "Medicinal Proprietary Preparation." It therefore comes within the express language of paragraph 75. The evidence is conclusive, we think, that "Johann Hoff's Malt Extract" has not been imported, advertised, bought or sold, as a "Malt Extract," but only as "The Genuine Johann Hoff's Malt Extract," and not as a Genuine Malt Extract. P. 58. It is always advertised as a *Medicine* or *Medicinal Proprietary Preparation*. Exhibit F. "Something more than Malt Extract," *ibid.* As a medicine, with directions for use, *ibid.* In case of illness. Exhibit G. Compared with beers and porters, *ibid.* See Opinions of the Medical Faculty, *ibid.*

It is advertised as of peculiar excellence, on account of its special virtues, from the care and material used in its manufacture. Exhibits F, G, and H.

It is described in Hager's Pharmaceutical Practice, published in Berlin, 1880, vol. 1, p. 1107, as "'Malt Extract—Beer of Health' of Johann Hoff, of Berlin (a remedy recommended against nearly all diseases), originated in 1861, is a sort of beer extract of Boneset Leaves, Blessed Thistle Leaves, Buckthorn Bark, with a little sugar coloring, and flavored with coriander, cardamom, cinnamon, anise, potash." Record, p. 37.

It is not supposed that, even if Johann Hoff were to import "French Paste Stones" and call them "The Genuine Johann Hoff's Diamonds," he would be required to pay duty on the paste as diamonds. Certainly if he imported diamonds as "French Paste," or common crystal, he could not escape the duty on diamonds. It would be impossible to enforce a rule that the thing named in the invoice is to be taxed, and not the actual thing imported. Of course, the importer must protest in the name the Collector chooses to give the article, or his protest is in vain.

Indeed, the courts only pass upon the acts of the Collector in his execution of the Tariff Act. Now, the Collector can only apply the statute to the actual thing imported. He cannot apply equitable rules, and estop the importer to deny that the thing imported is what it may have been called by him. Even if there were actual fraud in attempting to impose on the public, the Collector, on that ground, could not estop the importer from declaring the truth. But no fraud is shown here. It is not claimed that "The Genuine Johann Hoff's Malt Extract, or Beer of Health" is genuine "Malt Extract;" it is only such a Malt Preparation as Johann Hoff makes with the admixture of many other Medicinal articles.

We submit, also, that, under Paragraph 75, of the Tariff Act of 1890, in order to take a "Medicinal Proprietary

Preparation" out of its classification, on the ground that such "Medicinal Proprietary Preparation" is "specifically provided for in this act," it must be shown that the article so specifically provided for is a "Medicinal Preparation" in fact.

Now, "Malt Extract," the only article specifically mentioned in the Tariff Act, which it is claimed may include "Johann Hoff's Malt Extract," is not in any sense a "Medicinal Preparation," but is a food product.

"Malt Extract" is made from barley, and the only chemical change effected in the production of malt extract from barley, as stated in Chambers' Encyclopedia, is the transformation of much "hordeine"—a kind of starch—into starch, gum, and sugar, all of which are contained in the barley, but in a slightly different proportion. (See Webster's Dictionary.)

The table is stated in Chambers' Encyclopedia to be as follows:

	In barley.	In malt extract.
Hordeine (a kind of starch)	55	12
Starch	32	56
Sugar	5	15
Gluten	3	1
Gum	4	15
Resin	1	1
	100	100

We submit that such a change does not convert "malt extract" into a "Medicinal Preparation," much less into a "Medicinal Proprietary Preparation," which the "Genuine Johann Hoff's Malt Extract" is admitted to be. Under this section "German Silver" would not be dutiable as "Silver," in like circumstances.

We will give further illustrations of the errors into which we think the Circuit Court of Appeals was led by disregarding the doctrine of *Ferguson* v. *Arthur*.

It is admitted by the decision of the General Appraisers, and this admission is in line with all of the evidence, that "various preparations of malt, or malt extract, combined with other ingredients, * * * are recognized by the medical profession as remedial agents and are proprietary preparations." The decision referred to, in speaking of "Johann Hoff's Malt Extract," says, "A sample bottle of the article was submitted to the Appraiser at this port, for chemical determination by experts in this Department. He reports that the article contains alcohol, maltose, dextrine, ash-coloring matter, hop extract, albuminoids and water, and that the bottle contains not less than one pint."

If the theory of the decision of the Circuit Court of Appeals be correct, and if the Customs Officers and the courts must consider the separate ingredients of an article, then there would be vast difficulty in classifying an article containing the various ingredients above named. The resultant alcohol would have to be classified under Par. 8, at $2.00 per gallon, and 25 per cent. ad valorem; the maltose, under Par. 338, at 40 cents per gallon; the dextrine, under Par. 324, at 1½ cents per pound; the ash-coloring matter and hop extract would belong to the unclassified list, and the albuminoids and water would come in free. This presents a very clear case of *reductio ad absurdum*.

Again, the malt extract of commerce, which has been so clearly proven by the testimony in the record to be a substance entirely different in its character from the "Johann Hoff's Malt Extract," is undoubtedly a substance containing at least 95 per cent. of pure maltose, or cold infusion of barley malt. See testimony of M. J. Breitenbach, pages 13, 14; of A. J. Ditman, p. 17 *et seq.*; of A. H. Kennedy, p. 22 *et seq.*; of D. R. Chichester, p. 25, and of Moritz Eisner, p. 26. *et seq.* All this testimony goes to show that the malt extract, comprehended and intended to be taxed at 40 per cent. ad valorem in Par. 338, is a peculiar substance, which may be found either in the semi-liquid form, like molasses,

as is testified by one witness, or may be sometimes found in powdered form. The language of Par. 338, dealing with this peculiar article, specifies the forms in which it may be found, as fluid in casks, bottles, or jugs, and solid and condensed. The "Johann Hoff's Malt Extract," so called, differs in every essential particular from the above-described malt extract, and it is sufficient to say that it cannot be classed with the same, as under no circumstances could it be reduced to a condition to be called "solid or condensed."

Again, it is shown that of the constituent parts making up the "Johann Hoff's Malt Extract," but 10 per cent. is of the substance known to commerce as "malt extract." The "malt extract of commerce" is unfermented and sold with the caution to be kept in a cool place, whereas the 10 per cent. of malt extract in the "Johann Hoff's Proprietary Medicine" is shown to have been diminished by its contribution to the resultant alcohol formed in the bottle by the fermentation after composition, but which was not an original component part of the same, which shows that it is a fermented article. See the testimony of Francis Wyaw, pp. 33–35. Our contention, therefore, is that the "malt extract of commerce," commercially known as "malt extract," and that which any purchaser would receive upon calling upon any merchant dealing in it, would be the thick, glutinous, and saccharine matter described in the testimony as "malt extract," it being an unfermented cold solution of the extractive mass of barley malt, and which commands a market price as a food product rather than one used for any specific medicinal purpose. In order to classify the "Johann Hoff's Malt Extract Medicinal Preparation" with the "malt extract of commerce," above referred to, there should be a convertibility of one into the other, so as to make them the same for all practical purposes. In point of fact, however, Johann Hoff's preparation is only one of a great number of medicinal preparations, having as one of their component parts the malt extract of commerce. The prefix

of the name "Johann Hoff," therefore, for all purposes of commerce and customs, must be held to designate and describe an altogether different substance, both as to its character and uses, from the "malt extract of commerce." The "malt extract of commerce" is not dealt in, bought or sold, by the trade who do purchase, buy and sell, the "Johann Hoff's Malt Extract." Why? Because the malt extract of commerce is essentially a food product, is purchased as a basic substance for the manufacture of other articles, and is seldom used in its original condition as purchased, whereas the "Johann Hoff's Malt Extract" is sold only to the drug and medicine trade, and is purchased for and used as a medicinal preparation, it being regarded as specific in its action upon certain named diseases. This would seem to differentiate the two articles so thoroughly that there should be no difficulty in assigning each to its particular and peculiar place in the commerce of the country.

The summing up of the whole matter by the Judge of the Circuit Court, who had the testimony of the witnesses freshly before him, and who is familiar with the classifications of the Customs Officers, would seem to us to be conclusive. All the witnesses, and the decisions of the Board of General Appraisers, of the Circuit Court, and of the Circuit Court of Appeals, assert that "Johann Hoff's Malt Extract" is in fact a "medicinal proprietary preparation;" that it is so known to and used by the medical world, and is so advertised and sold. These things being true, this quality must be held to overcome any and all objections that could possibly arise, by reason of the use of the words "malt extract" in the name given by the originator to the "medicinal proprietary preparation."

Suppose that the article in question, which we contend is a proprietary medicine, under the name of "Johann Hoff's Malt Extract," composed as it is of several parts larger in quantity than the extract of malt used therein, had been called by the manufacturers, "Johann Hoff's Dextrine," or

"Johann Hoff's Hop Extract," or "Johann Hoff's Albuminoids," would it be insisted that, because the customs law specifically provided that albuminoids should be admitted free of duty, this "medicinal proprietary preparation" would therefore be admitted free? or, in case he had called it by either of the other names suggested would it be held that this "medicinal proprietary preparation" should, therefore, pay the duty provided for "hop extract" or "dextrine"? Manifestly such a classsification by the Customs Officers would be absurd. It is equally so in this case, and for the same reasons. To state such a proposition, is to refute it.

There is good reason for fixing a high rate of duty upon such a basic substance as the "commercial malt extract," because out of it may be made many other things, by the use of a small proportion of it, and by the admixture of other components of less, equal, or greater value. As an illustration, the "Johann Hoff's Malt Extract" contains but a low percentage of the "extract of malt," and a high percentage of other things possessing valuable medicinal qualities. It has not been the policy of our legislation to impose a high duty upon anything used for restoring health. One of the purposes of the tariff act of 1890 was to protect our barley-grower and our malter from foreign competition, and it was thought this could be done, to some degree, by putting a high duty upon "commercial malt extract" as such; but it was evidently not the purpose of those who passed the tariff act to impose this rate upon the various "medicinal preparations" which might contain some degree of the "extract of malt." The decision of the Circuit Court of Appeals is not in harmony with the spirit and purpose of this legislation and is wrong, because it classifies the article by the name given to it by its originator year ago, rather than by its peculiar and valuable qualities assigned to it, the directions for its use, its successful and beneficial use as a medicine, and by the testimony and approval

of the medical world, and this despite the fact that the words "malt extract" cannot be said to be broader, or more general in meaning and common acceptation, or easier of understanding and application, than the words "medicinal proprietary preparation," which, we contend, cover the article in question.

The decisions of the Board of General Appraisers, and of the Circuit Court of Appeals, turn largely upon the use of the words "not specially provided for in this act," in paragraph 75. We submit that the act would have had the same effect, without the use of these words, for a specific description of an article in a tariff act would necessarily control general words which might be broad enough to include it. Therefore, no other force is to be given to the words we have just quoted than they are entitled to as words of precaution. Paragraph 75 is in Schedule "A," entitled, "Chemicals, Oils, and Paints," and covering such medicinal articles and preparations as citric, sulphuric, tannic, and tartaric acids, ammonia, borax, camphor, chloroform, drugs, ethers, glycerine, iodine, iodoform, magnesia in its various forms, morphine, castor oil, cod-liver oil, croton oil, opium in its various forms, potashes, sodas and "preparations." To apply the argument of *Smythe* v. *Fiske*, 23 Wall., 380, the schedule contains a very full enumeration of the various articles upon which duty is to be collected. It was evidently intended to be exhaustive. The words quoted appear frequently throughout the whole act, notably so in paragraphs 5, 16, 18, 19, 24, 25, 26, 46, 47, 54, 74, 75, 76, 77, and 79 of Schedule "A." These words seem "to have been added, as it is not unusual in such cases, out of abundant caution, that nothing might escape." Paragraphs 74 and 75 cover "*all* medicinal preparations, including medicinal proprietary preparations." Par. 74 was framed to cover such preparations of which alcohol is a component part, or in the preparation of which alcohol is used, while paragraph 75 covers *all* such preparations of which alcohol is not

a component part. It will be observed that these two paragraphs cover *all* such preparations, classifying them as "Medicinal Preparations" and "including medicinal proprietary preparations." Therefore everything of a medicinal character is covered by these two paragraphs, absolutely and without question, if "not specially provided for in this act." Possibly the authors of these two paragraphs did not have in mind, when drafting them, the decision of this Court in *Morris* v. *Arthur*, 95 U. S., in which it is held that "it is the general rule, in the construction of revenue statutes, that specific provisions for duties on a particular article are not repealed or affected by the general words of a subsequent statute, although the language is sufficiently broad to cover the article first mentioned," and so they used the words "not specially provided for in this act" with a view to prevent importers, officers, and courts from holding that paragraphs 74 and 75 could cover any of the medicinal preparations named in the preceding paragraphs, or elsewhere in the act.

We submit that the words "medicinal proprietary preparations," in paragraph 75, are specific in character, and by force of their terms cover every "medicinal proprietary preparation," unless some especial provision can be found elsewhere in the act. Now, it is conceded, on all hands, that "Johann Hoff's Malt Extract" is such a "medicinal proprietary preparation." Therefore, it is covered by the specific provision of paragraph 75, and not by the general language of paragraph 338, which does no more than fix a duty on one of the component parts of the "medicinal proprietary preparation;" and we ask this Court to apply the rule above stated, and hold that the specific provision of paragraph 75 is not repealed or affected in any way by the general words of paragraph 338, "although the language is sufficiently broad to cover the article first mentioned," if we are to be guided by the designation of one of its component parts, and by the use in the law of two of the common words

of the name given to it by the originator of the "proprietary medicinal preparation."

Therefore, we respectfully submit that the decision and decree of the Circuit Court were in all things right, and that the Circuit Court of Appeals erred in reversing the same.

W. W. DUDLEY,
L. T. MICHENER,
CHARLES A. RAY,
Attorneys and Counsel for
Eisner & Mendelson Company.

Transcript
of
Records
1893

905

Supreme Court U. States
154 U. S.
503 - 505